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In The
Supreme Court of The United States
October Term 1998

SADANAND SINGH, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the United States Supreme Court issues an opinion but does not address retroactivity because the parties waived any such argument, has the Court "reserved the question" of whether the decision applies to the parties before it so as to preclude retroactive application of the Court's decision?

2. What causation standard applies in fraud-based "willful misconduct" cases under the Warsaw Convention?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners in this case are Sadanand Singh, Individually and as Executor of the Estate of Kala Singh, Deceased, Samir Singh, by and through Sadanand Singh, and Kalpana Singh, by and through Sadanand Singh (collectively "Singh plaintiffs"). Petitioners were plaintiffs in the District Court and appellants in the Court of Appeals.

Respondents, Pan American World Airways, Inc. ("Pan Am"), a New York Corporation, and Alert Management ("Alert"), a Florida Corporation, were defendants in the District Court and appellees in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Shah v. Pan American World Services, Inc.*, 148 F.3d 84 (2nd Cir. 1998). A copy of the opinion is reproduced in Appendix A. The opinions and orders of the Southern District of New York are unreported, with the exception of *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986*, 920 F.Supp. 408 (S.D.N.Y. 1996). Copies of these documents are reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered and filed on June 15, 1998. A petition for rehearing and suggestion for rehearing *in banc*[1] was timely filed on June 29, 1998. The Court of Appeals, on August 28, 1998, entered and filed its order denying the petition for rehearing and rejecting the suggestion for rehearing *in banc*. Apdx. A - 1. The jurisdiction of this Court to review the judgment and

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[1] Although typically deemed a "suggestion for rehearing *en banc*," the Court of Appeals for the Second Circuit uses the term "suggestion for rehearing *in banc*."

opinion of the United States Court of Appeals for the Second Circuit is invoked pursuant to 28 U.S.C. section 1254(1).

TREATIES AND STATUTES INVOLVED

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, TS No. 876 (1934), *reprinted in*, 49 U.S.C.A. § 40105 (1997) ("The Warsaw Convention")

Art. 17 of the Warsaw Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Art. 24(1) of the Warsaw Convention states:

> In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to conditions and limits set out in this convention.

Art. 24(2) of the Warsaw Convention states:

> In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions

as to who are the persons who have the right to bring suit and what are their respective rights.

Art. 25 of the Warsaw Convention states:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

28 U.S.C. section 1404(a) states:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. section 1407(a) states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers

for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. Provided however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

I. Proceedings in the District Court

This petition concerns claims arising out of the September 5, 1986, hijacking of a Pan Am aircraft in Karachi, Pakistan, and the resulting death and injury to the passengers.

The Singh plaintiffs' claims arise out of the misconduct of Pan Am. Prior to the hijacking, Pan Am published a series of advertisements containing promises of future increases in the level of airport security and representations of heightened security already implemented ("Alert advertising program"). Mrs. Singh, wife and mother to the Singh plaintiffs, was terrified of flying into terrorist countries and had postponed scheduled trips to India because of terrorism in the Middle East. After reading the Alert advertising program, Mrs. Singh booked her family on a Pan Am flight because of Pan Am's claims of heightened security. Regrettably, the Singh family was on Pan Am Flight 73 when terrorists hijacked the plane in Karachi, Pakistan, seriously wounding the Singh plaintiffs, and killing Mrs. Singh.

On February 23, 1987, the Singh plaintiffs brought suit in the Southern District of California seeking damages for the personal injury and death suffered on-board Pan Am's aircraft. Because the incident occurred during international travel, the provisions of the Warsaw Convention applied.[2]

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[2] The Warsaw Convention provides strict liability in international aviation accidents against airline carriers and a cap on damages. If a plaintiff can show that his or her

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On May 6, 1987, for purposes of pre-trial discovery and motions only, the Judicial Panel on Multi-District Litigation ("JPML") transferred the Singh plaintiffs' case, along with twelve other cases, to the Southern District of New York ("SDNY") pursuant to 28 U.S.C. section 1407. Over the Singh plaintiffs' opposition, on December 13, 1993, the SDNY granted Pan Am's motion to transfer venue for trial, thereby transferring the Singh plaintiffs' case to itself where it was ultimately consolidated with several other cases for trial of "common liability issues."

On April 14, 1994, a jury rendered a special verdict, finding that Pan Am had engaged in willful misconduct in connection with the Alert advertising program. The jury also found Pan Am's willful misconduct had not proximately caused the hijacking; however, the jury did not address whether the willful misconduct caused the Singh plaintiffs' injuries.

On February 14, 1996, the SDNY denied the Singh plaintiffs' post-trial motion to transfer their case back to the Southern District of California. Apdx. B – 44-62.

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damages were caused by the willful misconduct of the carrier, the cap on damages is lifted.

II. Proceedings in the Court of Appeals

A. Retroactive Application of Lexecon v. Milberg Weiss Bershad Hynes & Lerach

On March 3, 1998, while the Singh appeal was still pending in the Second Circuit, this Court decided *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, __ U.S. __, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), in which it held that a district court conducting pre-trial proceedings over cases transferred to it by the JPML cannot transfer such cases to itself for trial because the responsibility of the JPML, under 28 U.S.C. section 1407(a) to remand the cases to their transferor courts, precludes any such power of self-assignment. *Id.* at 964.

The Singh plaintiffs argued on appeal that when the SDNY transferred their case to itself, the transfer contravened 28 U.S.C. section 1407(a) as construed by this Court's ruling in *Lexecon*. The Second Circuit acknowledged *Lexecon* could be dispositive, but affirmed the SDNY's transfer order, stating that *Lexecon*'s holding was not retroactive because this Court had reserved the question of whether its holding would be applied to the parties before it. Apdx. A - 13-14. The Second Circuit went on to decide that *Lexecon* was not retroactive under *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), and that the SDNY's transfer of the Singh plaintiffs' case to itself was not error. Apdx. A – 14-17.

B. The Standard of Causation for Fraud-Based Willful Misconduct Claims Under the Warsaw Convention.

The Singh plaintiffs also argued on appeal that the trial court used an incorrect standard of causation to determine whether the willful misconduct of Pan Am had caused their injuries. *See* Apdx. C - 82-90. In 1996, this Court held in *Zicherman v. Korean Air Lines Co. Ltd.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), that if the Warsaw Convention does not provide a rule of law to guide a court in a decision, the applicable law is "the law that . . . govern[s] in the absence of the Warsaw Convention." *Id.* at 229.

The Warsaw Convention does not provide a standard of causation for fraud-based willful misconduct claims; yet, the Second Circuit declared *Zicherman* was not on point. Apdx. A - 21-24. Without the benefit of any precedent, the Court rejected the standard which would apply under *Zicherman*, and proceeded instead to craft its own standard of causation for fraud-based willful misconduct claims under the Warsaw Convention. Apdx. A - 24-27. Applying the new standard, the Second Circuit found no error in the SDNY's instruction to the jury. Apdx. A - 27-29.

REASONS FOR GRANTING THE WRIT

I. The Singh Plaintiffs' Petition for Writ of Certiorari Should Be Granted Because the Second Circuit's Published Opinion Conflicts With This Court's Rulings in Lexecon v. Miberg Weiss Bershad Hynes & Lerach and Harper v. Virginia Dept. of Taxation.

As stated in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993):

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and *must be given full retroactive effect* in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. at 97 (emphasis added).

In *Lexecon*, this Court applied the newly announced federal rule to the parties before it. *Lexecon, supra*, 118 S.Ct. at 966 Moreover, *Lexecon* was decided while the Singh plaintiffs' case was still open on direct review. Thus, under *Harper*, *Lexecon* "must be given full retroactive effect." *Harper, supra*, 509 U.S. at 97.

The Second Circuit held *Lexecon* was not retroactive by erroneously concluding the Supreme Court "reserved the question" of whether to apply its holding to the parties before it. In so concluding, the Second Circuit stated:

> Harper, however, did not require retroactive application where the Supreme Court explicitly reserves the question whether its holding should be applied to the parties before it. [citation] *Lexecon* is such a case. Responding to respondent's nonretroactivity argument, the [*Lexecon*] Court concluded that it was unnecessary for it to consider that issue because it was not presented to the lower courts or in opposition to the certiorari position. [citation] The [*Lexecon*] Court then remanded the case for further proceedings. We therefore apply the three-factor retroactivity analysis of *Chevron Oil v. Huson*. [citation]

Apdx. A - 14.

The Second Circuit's analysis is based on a mistaken premise. This Court did not reserve the question whether its holding applied to the parties before it in *Lexecon*. Rather, this Court simply declined to consider an argument for non-retroactivity because it had been waived:

> In their brief to this Court, Milberg suggests that any decision rejecting multidistrict

> litigation courts' practice of ruling on § 1404 transfer motions should be applied only prospectively under *Chevron Oil v. Huson.* [citation] Because this argument was not presented below, [citation] or to this Court when Milberg opposed petitioners' petition for certiorari, [citation] it is unnecessary for us to consider it here.

Lexecon, *supra*, 118 S.Ct. at 966, n.5. Thus, the Second Circuit's underlying premise, and its resulting conclusion that *Lexecon* should be applied only prospectively are erroneous.

Indeed, this Court has held that when it issues an opinion and the opinion discusses remedial measures, the opinion is retroactive. *Harper*, *supra*, 509 U.S. at 98. In *Harper*, the Virginia Supreme Court had held *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) was not retroactive. After granting Harper's petition for writ of certiorari, this Court clarified that *Davis* was retroactive, stating:

> Far from reserving the retroactivity question, our response to the appellee's concession constituted a retroactive application of the rule announced in Davis to the parties before the Court. Because a decision to accord solely prospective effect to Davis would have foreclosed any discussion of remedial issues, our "consideration of remedial issues" meant

> "necessarily" that we retroactively applied the rule we announced in Davis to the litigants before us.

Harper, 509 U.S. at 98 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (opinion of Souter, J.)).

The Virginia Supreme Court's erroneous interpretation of the *Davis* decision in *Harper* parallels the Second Circuit's misinterpretation of *Lexecon*. The Second Circuit assumed that because *Lexecon* did not expressly discuss retroactivity (*see*, *Lexecon*, *supra*, 118 S.Ct. at 966, n.5 (stating "it is unnecessary for us to consider it here")), the decision was therefore reserved and the Second Circuit could rely on *Chevron Oil* for its retroactivity analysis. Apdx. at A - 14.

It is irrelevant under *Harper* and *Beam* whether retroactivity is actually discussed if this Court addresses remedial measures. *Lexecon* did just that. *Lexecon* held the remedy for a violation of the 28 U.S.C. section 1407(a) mandate is *reversal* of the Court's decision. *Lexecon*, *supra*, 118 S.Ct. at 966. This Court, therefore, did apply its decision in *Lexecon* to the parties before it; thus, it "must be given retroactive effect." *See Harper*, *supra*, 509 U.S. at 97-98.

Even if the *Lexecon* opinion were ambiguous as to whether it should apply retroactively, an examination of post-*Lexecon* events confirms the propriety of retroactive application. This Court's actions since *Lexecon* suggest an

intent that it be applied retroactively. On June 26, 1998, this Court granted a petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in *B.C. Rogers Processors, Inc. v. BOC Group Inc.*, __ U.S. __, 118 S.Ct. 2365, 141 L.Ed.2d 732 (1998) and simultaneously vacated the Eleventh Circuit's judgment and remanded the case to that court "for further consideration in light of *Lexecon*." Had this Court intended for *Lexecon* to apply only prospectively, it would have been unnecessary for it to remand *B.C. Rogers* to the Eleventh Circuit for further consideration.

Despite evidence of *Lexecon*'s retroactive application, the Second Circuit ignored *Lexecon* and applied *Chevron Oil* to determine retroactivity. This was error. As Justice Souter stated in *James B. Beam*, "the legal imperative to apply a rule of federal law retroactively after the case announcing the rule has already done so must prevail over any claim based on a Chevron Oil analysis." *Harper*, *supra*, 509 U.S. at 98 (quoting *Beam, supra*, 501 U.S. at 540).

When the Second Circuit declined to apply *Lexecon* to the Singh plaintiffs' case, it created an exception not authorized by this Court, thereby denying litigants in its jurisdiction relief otherwise conferred by *Lexecon*. Moreover, the opinion creates uncertainty as to what constitutes "reservation" by this court.

This Court should grant the Singh plaintiffs' Petition for Writ of Certiorari to eliminate the conflict of law between

the Second Circuit Court of Appeals, and the United States Supreme Court's decision in *Lexecon* and *Harper*.

II. The Singh Plaintiffs' Petition For Writ Of Certiorari Should Be Granted Because The Second Circuit Has Established A Standard Of Causation For Fraud-Based Willful Misconduct Cases Under The Warsaw Convention Which Conflicts With A Relevant Decision of This Court; What Standard Applies In Such Cases Has Not Been, But Should Be, Settled By This Court.

As the Second Circuit acknowledged, the Warsaw Convention does not provide a standard of causation for fraud-based willful misconduct cases. In fact, the Court specifically stated determination of such a standard was an issue of "first impression". Apdx. A - 24. That being true, this Court's recent case law guides the determination of the proper standard.

A. California Law Governs the Standard of Causation for Fraud-Based Misconduct Cases Under the Warsaw Convention Because the Convention is Silent On This Point.

In *Zicherman v. Korean Air Lines Co. Ltd.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), this Court held that in absence of a rule of law contained in the Warsaw Convention itself, the law that will govern a cause of action under the Convention is not federal common law, but rather,

"the law that would govern in the absence of the Warsaw Convention." *Id.* at 229.

The Second Circuit declined to follow *Zicherman*, stating that even if the Warsaw Convention lacks a rule of law to govern a cause of action under the Convention, a court may look to the law that would govern in the absence of the Convention only if the Convention expressly invites it to do so. Apdx. A - 22-23. In this vein, the Court stated:

> Article 24 of the Convention states that any action for damages under Article 17 "can only be brought subject to the condition and limits set out in this convention." Convention art. 24(1), 24(2) [sic]. We believe that this means that unless the Convention reserves an issue for determination by the law of another jurisdiction, the law of the Convention – not federal common law, state law, or any other law of the forum court – applies.

Apdx. A - 23.

Prior to the Second Circuit's opinion, however, there was no "law of the Convention" governing the standard of causation. The Warsaw Convention contains no such standard. Nonetheless, the Second Circuit rejected *Zicherman* in favor of crafting its own standard of causation for fraud-based willful misconduct claims. In the process, the Second Circuit considered three potential candidates for the applicable standard: 1) factual causation; i.e., proof that "but

for" the misrepresentation, the plaintiff would not have been injured; 2) proof of reasonable reliance on the misrepresentation coupled with a reasonable relationship between the injuries and the representations relied upon;[3] and 3) proof of reasonable reliance on the misrepresentation and that the damages would not have occurred if the carrier had performed as promised. Apdx. A – 25-27. The Second Circuit rejected the first and second standard and adopted the third. Apdx. A - 26-27.

The Second Circuit's decision is incorrect for two reasons. First, the Court misinterpreted *Zicherman* as holding that absent a rule of law contained in the Warsaw Convention itself, outside law will govern a cause of action only if the Warsaw Convention specifically authorizes application of outside law. *Zicherman* contains no such qualification;[4] moreover, the Second Circuit itself previously acknowledged in *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (2nd Cir. 1996), that if '[t]he Convention itself contains no rule of law governing the [ ] question", then the law that applies in the absence of the Warsaw Convention governs.

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[3] This standard was advocated by the Singh plaintiffs at the Court of Appeals, since it was the prevailing rule in California which should have been applied according to *Zicherman*.

[4] In fact, if such a qualification has been intended, it would have been unnecessary for this Court to discuss the ramification of the Convention's silence on an issue.

Id. at 8. *Accord*, *Brink's Ltd. v. South African Airways*, 93 F.3d 1022 (2nd Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 959, 136 L.Ed.2d 845. Thus, the Second Circuit incorrectly declined to look to outside law, when, in fact, it must.[5]

The Second Circuit further supported its rejection of *Zicherman* by proclaiming uniform application of Warsaw law to be the overriding concern, and concluding that use of other forums' law would inhibit this goal. Apdx. A - 24. This reasoning conflicts with the Second Circuit's previous interpretation of *Zicherman*. In *Pescatore*, the Second Circuit stated:

> Zicherman ruled specifically that the Warsaw Convention does not express a compelling interest in uniformity that warrants supplanting bodies of law that are otherwise applicable . . . [and the Supreme] Court determined that the law of international travel is not an area in which the imposition of uniformity was found feasible.

Pescatore, *supra*, 97 F.3d at 11. For these reasons, the Second Circuit's rejection of *Zicherman* was wrong.

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[5] *See Saavedra v. Korean Airlines, Co. Ltd.*, 93 F.3d 547, 552 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 584, 136 L.Ed.2d 514 (1996) (stating "no cause of action directly under the Warsaw Convention exists; the Convention merely provides 'pass-through' provisions, which allow the courts to use only domestic causes of action.").

Under *Zicherman*, controlling law is determined according to the choice of law rules of the forum jurisdiction. *Zicherman, supra*, 516 U.S. at 231; *Accord, Pescatore, supra*, 97 F.3d at 5; *Brink's, supra*, 93 F.3d at 1030. When there has been a change in venue, as here, the forum jurisdiction is where the action was filed -- not the transferee jurisdiction. *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Here, the action was filed in California; thus, California's choice of law rules determine which substantive law controls the Singh plaintiffs' fraud-based willful misconduct claim. *Valley Juice Ltd., Inc. v. Evian Waters of France, Inc.*, 87 F.3d 604, 607 (2nd Cir. 1996).

In a California choice of law analysis, the interests of each potentially concerned state are compared. *Reich v. Purcell*, 67 Cal.2d 551, 556, 432 P.2d 727, 63 Cal.Rptr. 31 (1967). Here, California has an overriding concern in protecting its residents from the fraudulent activities of non-resident enterprises conducting business within its borders. The record shows the Singh plaintiffs are all residents of California. Thus, California law must control.[6]

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[6] Even if New York choice of law rules were used instead of California, California law would still govern. *See Pescatore, supra*, 97 F.3d at 13 (stating "Pan Am contends that we should disregard Scottish law and instead apply the law of the decedent's and the plaintiff's domicile – Ohio. We agree.").

B. Under California law, the Standard of Causation for Fraud-Based Misconduct Cases Brought Under the Warsaw Convention Requires Proof of Reliance and a Relationship Between the Misrepresentation and Cause of Injury.

Under California law, two different standards of causation have been applied for fraud-based personal injury claims. One standard requires that causation be established by simply proving that the plaintiff relied on the representations, thereby subjecting himself to harm. *See Garcia v. Superior Court*, 50 Cal.3d 728, 737, 789 P.2d 960, 268 Cal.Rptr. 779 (1990); *Lacher v. Superior Court*, 230 Cal.App.3d 1038, 1048-1050, 281 Cal.Rptr. 640 (1991). The other standard requires proof of both reasonable reliance and a reasonable relationship between the misrepresentation and the cause of injury. *See Ohara v. Western Seven Trees Corp.*, 75 Cal.App.3d 798, 142 Cal.Rptr. 487 (1977).[7] The Singh plaintiffs conceded at oral argument that the second, more onerous standard, should apply.

Unfortunately, the causation issue as framed by California's standard, was not decided by the jury at trial. Pursuant to the SDNY's direction, the jury heard no evidence,

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[7] In *Ohara*, the court found that a plaintiff who moved into an apartment complex due to representations of safety could recover for damage suffered from rape because the cause of her injuries was related to the subject of the misrepresentation. *Ohara*, 75 Cal.App.3d at 805.

received no instruction and made no finding concerning the Singh plaintiffs' reliance on the fraudulent advertising which was found to constitute willful misconduct. Therefore, the Singh plaintiffs' case must be remanded to the trial court to allow presentation of such evidence to the jury, and a subsequent rendering of a jury verdict consistent with this standard.

Even if the Second Circuit's disregard of *Zicherman* were not erroneous, the Court would still have arrived at the wrong standard of causation for fraud-based willful misconduct cases. Of the three possible standards discussed by the Second Circuit, the second standard parallels California law: that the plaintiff must prove reasonable reliance on the misrepresentation plus a reasonable relationship between the misrepresentation and the injury. *See Ohara, supra*, 75 Cal.App.3d at 805. The Court disregarded this standard stating:

> The Convention's clearly overriding purpose -- to limit air carriers' potential liability in the event of accidents, would be undermined if air carriers were held liable for damages that would have occurred regardless of whether or not the carrier's representations of improved security were ultimately performed as promised.

Apdx. A – 26.

The Second Circuit thus established a standard of causation requiring proof of reasonable reliance on the misrepresentation and proof that the damages would not have occurred if the carrier had performed as promised. *Id.* The Court's conclusion is faulty for two reasons.

First, the standard provides no deterrent for fraudulent willful misconduct. Under the Second Circuit's standard of causation, airlines can, with impunity, induce ridership by fraudulent promises and misrepresentations, so long as the victim of tragedy cannot satisfy the speculative burden of proving their injuries would not have occurred if circumstances were as promised and represented. In so holding, the Second Circuit has insulated airlines from the consequences of their own fraud.

Moreover, the Second Circuit's standard is virtually unsupported by any analysis or reference to existing law. If allowed to stand, this faulty standard will set the precedent for all fraud-based willful misconduct Warsaw Convention cases. The causation standard in such cases should either be determined according to applicable outside law under *Zicherman*, or be carefully crafted by this Court to reflect the principle of American tort law that "responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault." Restatement (2d) Torts, § 435B, comment a.

Because the standard of causation that applies to fraud-based willful misconduct claims under the Warsaw Convention is an issue of first impression throughout the federal system, this Court should grant review to provide guidance on what the standard should be.

CONCLUSION

For the foregoing reasons, petitioners the Singh plaintiffs respectfully request that this Court grant a Writ of Certiorari so as to correct the conflict of law between the Second Circuit and the United States Supreme Court, and to decide an important federal question, that has not been, but should be, settled by this Court.

Dated: November 25, 1998

Respectfully Submitted,

Seltzer Caplan Wilkins & McMahon

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**Counsel of Record*

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second circuit, held at the United States Courthouse, Foley Square, in the city of New York, on the 28 day of August one thousand nine hundred and ninety-eight.

Singh,

Plaintiff-Appellant,

v. Dkt. No: 97-7428

Pan American World,

Defendant-Apellee. [sic]

A petition for rehearing containing a suggestion that the action be reheard in [sic] banc having been filed herein by the appellant Singh.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Kalpana SHAH, Mehul Shah, Utpala M. Desai, Milind Sharad Desai, Narendra R. Desai, Swati N. Desai, Plaintiffs, Sadanand Singh, Individually and as Executor of the Estate of Kala Singh, Deceased, Samir Singh, by and through Sadanand Singh, Guardian Ad Litem, Kalpana Singh, by and through Sadanand Singh, Guardian Ad Litem, Faraidoon Oshtory, Manjula S. Patel, Sangita Patel, Nikita Patel, Individually and as Heirs at Law to Surendra Patel, Deceased, Bakul Shah, Anthony Father Anthony Theodore, Dilip Parekh, Avani B. Shah, Rupal B. Shah, Aisha Begum, Mehboob Kahn, Gayatri Dave, Gargi Dave, minors, by their Guardian Ad Litem, Vinod Dave, Sanjay Patel, a minor, by and through his Guardian Ad Litem, C.N. Patel, Ranjanben Patel, Jayshreeben Patel, minors, by and through their Guardian Ad Litem, Pravin Patel, Khanjan Dalal, Kalpesh Dalal, Deepali Desai, Nagin Patel, Tara Patel, Satish Patel, Govind Patel, Chotubhai Patel, Jamna Patel, Ganga Patel, Ajay Patel, a minor, by and through his Guardian Ad Litem, Parvati Patel, Parvati Patel, Plaintiffs-Appellants,

v.

PAN AMERICAN WORLD SERVICES, INC., Defendant, Pan American World Airways, Inc., Alert Management, a

Florida Corporation, Does 1-50, Defendants-Appellees.

Docket Nos. 97-7428(L), 97-7526(CON), 97-7556(CON), 97-7558(CON), 97-7562(CON), 97-7564(CON), 97-7566(CON), 97-7568(CON), 97-7572(CON), 97-7574(CON) and 97-7576(CON).

United States Court of Appeals,
Second Circuit.

Argued March 13, 1998.
Decided June 15, 1998.

Before: CARDAMONE, WALKER and MAGILL,[1] Circuit Judges.

WALKER, Circuit Judge:

Plaintiffs-appellants Sadanand Singh, et al., appeal from the March 24, 1997 judgment of the United States District Court for the Southern District of New York (John E. Sprizzo, District Judge) after jury trial, entered pursuant to Fed.R.Civ.P. 50, 54(b), and 58, capping each appellant's recovery at $75,000 under the Convention for the Unification of Certain Rules Relating to International Transportation by

[1]The Honorable Frank J. Magill, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Air, Oct. 12, 1929, 49 Stat. 3000, TS No. 876 (1934), reprinted in 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention" or "Convention"); dismissing various California State law claims brought by plaintiffs-appellants Sadanand Singh, individually and as executor of the Estate of Kala Singh, and Samir and Kalpana Singh, through a guardian ad litem (collectively, the "Singh plaintiffs"); and dismissing the Singh plaintiffs' motion, pursuant to 28 U.S.C. § 1404(a), to transfer venue to the Southern District of California for trial on the state claims and on Warsaw Convention claims relevant only to the Singh plaintiffs (collectively, the "non-common" claims). *See Singh v. Pan American World Airways, Inc.* (*In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Int'l Airport, Pakistan on Sep. 5, 1986*), 920 F.Supp. 408, 415 (S.D.N.Y.1996) "*Karachi* ").

This case arises out of the tragic September 1986 hijacking of Pan Am Flight 73 in Karachi, Pakistan, that led to approximately twenty deaths and numerous other injuries. The case presents the issue of whether fraudulent misrepresentation can constitute "wilful misconduct" within Article 25(1) of the Convention and, if it can, what causation as between the fraud and plaintiffs' damages is required. We also address the threshold question of whether the recent Supreme Court decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, --- U.S ---, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998)-- requiring cases transferred under 28

U.S.C. § 1407 to be remanded to the transferor courts at the conclusion of pre-trial proceedings--applies as a general matter to plaintiffs' actions and, if *Lexecon* does apply, whether it should apply retroactively in this case.

Affirmed.

Background

In 1986, in response to public concern over terrorism on international airline flights, Pan American World Airways, Inc. ("Pan Am") contracted with Alert Management Systems, Inc. ("Alert") to provide a security system for its international flights. Pan Am thereafter advertised its Alert program, making various representations to the public about improved airport security that either had already been implemented or would be implemented by Pan Am. The Singh plaintiffs (but none of the other plaintiffs-appellants) allege that they saw Pan Am's advertisements and relied upon the representations of improved security therein in deciding to fly on Pan Am Flight 73. On September 5, 1986, Pan Am Flight 73 departed Bombay, India, en route to New York, New York, with a scheduled intermediary stop at Karachi International Airport in Karachi, Pakistan. While Flight 73 was on the ground at Karachi International Airport, armed hijackers drove a vehicle through a gate onto the airport tarmac, boarded the aircraft, and eventually opened gunfire on its passengers, killing some twenty passengers and injuring numerous others.

Plaintiffs-appellants are either passengers who were injured or representatives of passengers who were killed as a

result of the hijacking. On February 23, 1987, the Singh plaintiffs filed an action against defendants in the Southern District of California asserting claims under the Warsaw Convention and California state law for the personal injury and death suffered on board Pan Am Flight 73. Numerous other actions relating to the hijacking of Pan Am Flight 73 were filed against Pan Am in various courts across the United States. With the exception of the action entitled *Ganga Bahn v. Pan American World Airways, Inc.*, No. 87-CV-0547, all of these actions originated in courts other than the Southern District of New York ("Southern District") and in 1987 and 1988 were transferred by the multidistrict litigation panel ("MDL panel") to the Southern District for consolidated pre-trial proceedings under 28 U.S.C. § 1407. In December 1993, the Southern District granted Pan Am's motion to transfer and consolidate all of the actions for trial in that court.

On April 14, 1994, after a six-week jury trial of plaintiffs' Warsaw Convention claims, the jury returned a special verdict answering the following four questions:

1) Do you find by a fair preponderance of the evidence that Pan Am [ ] engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program? The jury answered "yes."

2) Do you find by a fair preponderance of the evidence that Pan Am[ ] engaged in wilful misconduct, as defined by the Court, by flying into Karachi International Airport on September 5, 1986?

The jury answered "no."

3) If the answer to Question # 1 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan Am [ ], in connection with the Alert Security Program, was a proximate cause of the hijacking?
The jury answered "no."

4) If the answer to Question # 2 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan Am [ ], by flying into Karachi International Airport on September 5, 1986, was a proximate cause of the hijacking?
The jury did not answer.

The jury found therefore that defendants had not committed wilful misconduct by flying into Karachi, a claim common to all plaintiffs. It is not clear, however, why the district court submitted questions # 1 and # 3 to the jury as claims common to all of the plaintiffs, since defendants' alleged fraudulent misrepresentations could be relevant only to plaintiffs such as the Singh plaintiffs who, at minimum, were aware of defendants' advertisements about the Alert security program. Finally, the district court did not submit to the jury the question of whether defendants' inadequate security itself constituted wilful misconduct, in all likelihood because little if any evidence indicated that defendants had any power to control the level of security at Karachi International Airport.

On February 14, 1996, almost two years after the

jury's verdict, the district court denied the Singh plaintiffs' motion, pursuant to 28 U.S.C. § 1404(a), to transfer back to the Southern District of California their remaining noncommon California law claims and their fraudulent misrepresentation claim under the Convention. *See Karachi*, 920 F.Supp. at 415. The district court then dismissed the Singh plaintiffs' state claims as preempted by both the Warsaw Convention and the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1) (1993), reconstituted in 49 U.S.C. § 41713(b)(1), and dismissed their fraudulent misrepresentation claim as barred by the jury's special verdict. *Karachi*, 920 F.Supp. at 414. On March 24, 1997, the district court entered final judgment, pursuant to Fed.R.Civ.P. 50, 54(b), and 58, awarding plaintiffs damages within the limitations imposed. It refused to award damages in excess of those limits because--as per the jury's special verdict--plaintiffs had failed to establish either defendants' wilful misconduct or the requisite causation between such misconduct and their damages.

Plaintiffs-appellants appeal from that judgment. In particular, the Singh plaintiffs contend that (1) notwithstanding the jury's special verdict, they are entitled to bring their fraudulent misrepresentation claim under the Convention, and (2) they are entitled to bring their California state law claims in addition to their Warsaw Convention claim. All of the plaintiffs-appellants also request a new trial on the basis that the district court's alleged misconduct during

trial prejudiced the jury and that the court improperly refused to qualify as an expert one of plaintiffs' proffered witnesses.

Discussion

I. Remand Under 28 U.S.C. § 1407

We first address the threshold issue of whether the Supreme Court's recent decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, --- U.S ---, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), requires this court to vacate the district court's judgment as to all plaintiffs and remand all of the actions to the transferor courts from which the MDL panel transferred each action pursuant to 28 U.S.C. § 1407.

With the exception of Ganga Bahn, No. 87-CV-0547, all of the appellants' actions originated in courts other than the Southern District and were transferred in 1987 and 1988 to the Southern District by the MDL panel pursuant to 28 U.S.C. § 1407 § 1407"), which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such

> actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. . . .

(Emphasis added). In 1993, over the objections of all of the plaintiffs, defendants moved to transfer the actions to the Southern District for a consolidated liability trial, pursuant to 28 U.S.C. § 157(b)(5) (" § 157(b)(5)")--a bankruptcy statute--or alternatively, pursuant to 28 U.S.C. § 1404(a) (" § 1404(a)")--a general venue statute. On December 13, 1993, the district court granted defendants' motion to transfer "for the reasons stated at [the] Oral Argument" of December 10, 1993, but did not state whether it was relying on § 157(b)(5) or § 1404(a). The parties have not furnished a transcript of that oral argument and it is not a part of the record on appeal. A 1994 joint pre-trial order signed by the district court and lead counsel for both parties, however, states that "all actions have been transferred to [the Southern District], pursuant to Title 28 United States Code, § 1404(a), for the trial of all common liability issues," and therefore it appears that the district court did transfer the actions pursuant solely to § 1404(a). In 1994, following trial and prior to the district court's entry of judgment, the Singh plaintiffs moved, pursuant to § 1404(a), to transfer their action back to the Southern District of California--a motion denied by the district court in 1996. *See Karachi*, 920 F.Supp. at 415.

In *Lexecon*, the Supreme Court held that a district court to which cases have been transferred pursuant to § 1407 for pretrial proceedings cannot, after conclusion of the pretrial proceedings, transfer the case to itself for trial under § 1404(a). *See* --- U.S. at ---, 118 S.Ct. at 959. Because the plain language of § 1407 dictates that "[e]ach action ... transferred [under § 1407] shall be remanded by the [MDL] panel at or before the conclusion of ... pretrial proceedings," 28 U.S.C. § 1407(a), the Court reasoned that "no exercise in rulemaking can read that obligation out of the statute." *Lexecon*, --- U.S. ---, at 118 S.Ct. at 963.

Defendants respond with four arguments each of which, if accepted, could independently bar application of Lexecon: (1) that the district court transferred the action to itself for trial pursuant to § 157(b)(5) and not § 1404(a), and therefore Lexecon does not apply; (2) that even if the district court did transfer pursuant to § 1404(a), it could have transferred pursuant to § 157(b)(5) and, again, Lexecon would not apply; (3) that even if Lexecon is applicable as a general matter, it should not be applied retroactively in this case; and (4) that plaintiffs failed to preserve their Lexecon remand right by failing to request a remand under § 1407 or to object properly to the district court's transfer of venue.

A. Lexecon's Applicability to Section 157(b)(5)

We note first that the district court did transfer plaintiffs' action pursuant to § 1404(a) and not § 157(b)(5).

Even assuming, however, that we may look to whether venue was sustainable under another legal basis such as § 157(b)(5), and assuming that venue in this action would have been sustainable under § 157(b)(5)--both issues as to which we express no opinion-it appears that *Lexecon* should apply to § 157(b)(5) transfers as well as to § 1404(a) transfers. Although *Lexecon's* holding applies explicitly only to § 1404(a)-the only statute under which the transferee district court in that case purported to transfer venue--*Lexecon's* reasoning applies equally to transfers pursuant to any venue statute. *Lexecon* recognizes that "no exercise in rulemaking can read... out of the statute" the MDL panel's obligation to remand each action to its respective transferor court at or before the conclusion of pretrial proceedings. *Id.* (emphasis added). *Lexecon* does not preclude later consolidation of multiple suits for trial after they have first been returned to the district courts from which they came. "[O]n any view of § 1407(a), if an order may be made under § 1404(a), it may be made after remand of the case to the originating district court." *Id.* at 118 S.Ct. at 964 (footnote omitted) (emphasis added). Indeed, *Lexecon* observes that § 1407

> affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes [such as § 157(b)(5)]. . . . The subsection requires that transferred cases be remanded to the

> originating district at the close of coordinated pretrial proceedings.

Id. (quoting H.R.Rep. No. 90-1130, at 3-4 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900-01). Rather, posing "[t]he relevant question . . . [of] whether a transferee court, and not a transferor court, may grant . . . a motion [for transfer of venue]," the Court concluded that "self-assignment is beyond the scope of the transferee court's authority." *Id.*

We also note that *Lexecon* is not premised upon the belief that § 1404(a) does not itself permit self-transfer (whereas, as defendants may claim, § 157(b)(5) does). *Lexecon* explicitly leaves unresolved the issue of whether § 1404(a) permits self-transfer *See id.* at ---- n. 4, 118 S.Ct. at 964 n. 4. In short, *Lexecon* and § 1407 require that the MDL panel remand to the transferor court any action "at or before the conclusion of . . . pretrial proceedings," and any further transfers of venue for trial under any statute must follow such remand. Whether, after remand to the transferor court, a court has the power to transfer venue to itself under § 1404(a) or § 157(b)(5) is a separate issue that we have no need to decide.

B. Retroactivity of *Lexecon*

We next turn to whether *Lexecon* should be applied retroactively in this case.

> When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law

> and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). *Harper*, however, did not require retroactive application where the Supreme Court explicitly " 'reserve[s] the question whether its holding should be applied to the parties before it.' " *Id.* (*quoting James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991)). *Lexecon* is such a case. Responding to respondent's nonretroactivity argument, the Court concluded that it was "unnecessary for [it] to consider" that issue because it was not presented to the lower courts or in opposition to the certiorari petition. *See Lexecon*, --- U.S. at ---- n. 5, 118 S.Ct. at 965 n. 5. The Court then remanded the case for further proceedings. We therefore apply the three factor retroactivity analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, ... we must ... look[ ]

> to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id. at 106-07, 92 S.Ct. 349 (citations and quotation marks omitted).

Because *Lexecon* "reverse[d] the longstanding practice under [§ 1407]," --- U.S. at ---, 118 S.Ct. at 962; *see, e.g., Pfizer, Inc. v. Lord*, 447 F.2d 122, 122-25 (2d Cir.1971), it is unquestionable that *Lexecon* "overrul[ed] clear past precedent on which litigants may have relied. " Second, retrospective application of *Lexecon* would frustrate the "essential [sic] purpose of section 1407 to 'promote the just and efficient conduct' of complex multidistrict litigation." *Pfizer*, 447 F.2d at 125 (quoting 28 U.S.C. § 1407(a)); *see Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (section 1407 is one method "by which the burdens of multiple lawsuits may be avoided"). In the instant case, this primary concern outweighs the subsidiary concern of § 1407 to "favor ... [the] plaintiffs' choice of forum." Lexecon, --U.S. ---, at 118 S.Ct. at 960. In 1993, the

transferee district court transferred the actions to itself for trial; in 1994, that court held a six-week jury trial; and *Lexecon* was not decided until March 1998, nearly a year after the judgment of the district court and ten days before oral argument in this court. Retroactive application of *Lexecon* would require remand of each action to its respective transferor court, with the possibility that some or all of the actions will not be re-transferred to the Southern District. If this should happen, the jury's special verdict will be of no effect as to some or all of the actions, which would then have to be retried, possibly separately. Retroactive application could therefore lead to an enormous waste of judicial resources, precisely the result Congress sought to avoid by enacting § 1407. At least when a trial has been completed and final judgment has been entered, as in the instant case, the second *Chevron* factor weighs heavily in favor of non-retroactive application.

As to the third *Chevron* factor, which weighs the equities of retroactive application, the Supreme Court has recently observed that "we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Harper*, 509 U.S. at 97, 113 S.Ct. 2510 (alterations in original) (quoting *Beam*, 501 U.S. at 543, Ill S.Ct. 2439). This factor may therefore be of little, if any, effect. Assuming that the third factor is no longer

valid, we easily hold that the first two *Chevron* factors in this case preclude Lexecon 's retroactive application. To the extent that the third *Chevron* factor still has force, the equities still favor not applying *Lexecon* in this case. After twelve years of litigation, the parties have an interest in resolution of the fundamental issues in this case and, if we so decide, a final judgment from this court.

Because we hold that *Lexecon* does not apply retroactively to the instant action, we do not address whether either the Singh or the non-Singh plaintiffs waived their right to a remand under § 1407. *See Lexecon*, --- U.S. at ---, n. 1, 118 S.Ct. at 962 n. 1.

II. Warsaw Convention Claim

We next turn to the merits of appellants' Warsaw Convention claim. The Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire," Convention, art. 1, and governs the liability of international air carriers for damages resulting from an "accident," Convention, art. 17, which has been interpreted to include hijacking or terrorist activity. *See Pflug v. Egyptair Corp.*, 961 F.2d 26, 29 (2d Cir.1992). Under Article 17 of the Convention,

> [t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident

> which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 22 of the Convention, as modified by the Montreal Agreement,[2] limits the liability created by Article 17 "for each passenger for death, wounding, or other bodily injury [to] $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit [shall be] $58,000 exclusive of legal fees and costs." Defendants have conceded liability and the district court entered judgment against defendants for damages within the limits prescribed by Article 22 as modified.

Article 25(1) of the Convention as translated, however, provides that

> [t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or

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[2]The Montreal Agreement, otherwise known as the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol Agreement CAB 18990, applies where (as in the instant case) the flight itinerary includes a stop in the United States. Pan Am is a signatory to the Montreal Agreement, a private agreement that has been approved by the United States government by Exec. Order No. 23,680, 31 Fed.Reg. 7,302 (1966).

> by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

The Singh plaintiffs claim that the district court improperly capped defendants' liability to the limits prescribed by Article 22 as modified because defendants' misrepresentations on the subject of improved airport security constitute "wilful misconduct" within Article 25(1) and caused them damage. This claim, sharply contested by defendants, is a principal issue of this appeal.

A. Fraudulent Misrepresentation as "Wilful Misconduct"

As a preliminary matter, defendants maintain that the district court erred when it held that fraudulent misrepresentation by an air carrier can itself constitute "wilful misconduct" within Article 25(1) of the Convention. Defendants claim that such a holding "transform[s] the Convention into an international agreement that imposes liability on air carriers for allegedly false or fraudulent advertising," and undermines the desired uniformity of the Convention's liability scheme by "allow[ing] those passengers who have 'relied' on fraudulent advertising to recover amounts in excess of the generally applicable limits of the Convention, while other passengers who suffered equal or greater injuries in the same accident would not." The Singh plaintiffs respond that the Convention was not designed to "insulate an airline

from the consequences of its own fraud," and that " where the wilful misconduct consists of fraudulent statements made before the flight to lure passengers onto the aircraft, it is only logical that the misconduct can affect different passengers differently, and that they may have different claims based on their individual circumstances. "

"Wilful misconduct under the Convention means that a carrier must have acted either 1) with knowledge that its actions would probably result in injury or death, or 2) in conscious or reckless disregard of the fact that death or injury would be the probable consequence of its actions." *Pagnucco v. Pan American World Airways, Inc.* (*In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*), 37 F.3d 804, 812 (2d Cir.1994) ("*Lockerbie II* ").[3] The district court defined wilful misconduct for the jury as making false statements either knowingly or "with no basis in fact or with reckless disregard of the truth" and with awareness that defendants' "fail[ure] to act in the way they promised to do" was "likely to cause injuries to passengers." *See* Trial Tr. at 2750, 2762. It is unclear to us why, as defendants contend, fraudulent misrepresentations as to the state of an airline's security should enjoy unique status as non-wilful misconduct within Article 25. Indeed, we recognized such wilful misconduct in *Lockerbie II*, 37 F.3d at 822 (admitting, as proof of misconduct, "proof regarding the 'Alert' Security Program

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[3]We discuss the causation aspect of wilful misconduct in part II(B), below.

reveal[ing] first, that it was neither related to security, nor was it a program. Instituted by Pan Am in May 1986 during a period of sharp decline in international travel due to terrorist attacks, the program was a misleading public relations ploy designed to make would-be travelers feel more secure. "). The Convention's uniformity principle, moreover, plainly does not require equal treatment of all passengers injured by an aviation accident where only a subset of those passengers were injured as a result of the carrier's wilful misconduct--here, Pan Am's fraudulent misrepresentations.

B. Causation

Our conclusion that fraudulent misrepresentation can constitute "wilful misconduct" leads to the much more difficult question of what causal nexus must be shown between the misrepresentation and plaintiffs' damages. We therefore determine first, the proper standard for causation under the Convention and second, whether the jury's special verdict precludes a finding of causation under that standard.

(1) Proper Standard of Causation. Article 25 of the Convention which, as noted, removes the liability limitation of Article 22, speaks only generally to causation: liability exists where the plaintiffs' "damage is caused by [the carrier's] wilful misconduct. " Challenged to find the test for causation in fraudulent misrepresentation cases, a matter the Convention leaves unresolved, the Singh plaintiffs suggest a winding path to that conclusion. They argue that, in the

absence of a prescribed test for causation in fraudulent misrepresentation cases, the Convention derogates that issue to another source of law-here United States law, *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227-28, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996); that *Zicherman* forbids creation of a federal common-law rule of causation, *see id.* at 230-31, 116 S.Ct. 629; that, in the absence of federal statute, the controlling law (including choice of law rules) is that of the forum jurisdiction, *see Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030 (2d Cir.1996), *cert. denied*, --- U.S ---, 117 S.Ct. 959, 136 L.Ed.2d 845 (1997); that where there has been a change of venue, the forum jurisdiction is where the action has been filed--here the Southern District of California, *see Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964); that California's choice of law rules therefore determine which substantive law applies, *see Valley Juice Ltd. v. Evian Waters of France, Inc.*, 87 F.3d 604, 607 (2d Cir.1996); that under California's if governmental interests" approach to choice of law rules, California law would apply, *see Reich v. Purcell*, 67 Cal.2d 551, 555-56, 63 Cal.Rptr. 31, 432 P.2d 727 (1967); and that California law prescribes a causal nexus between wilful misconduct and damages that is weaker than the causation test used by the district court. *See Garcia v. Superior Court of Santa Clara County*, 50 Cal.3d 728, 737, 268 Cal.Rptr. 779, 789 P.2d 960 (1990). We disagree.

Article 24 of the Convention states that any action for

damages under Article 17 "can only be brought subject to the conditions and limits set out in this convention. " Convention, arts. 24(1), 24(2). We believe that this means that unless the Convention reserves an issue for determination by the law of another jurisdiction, the law of the Convention--not federal common law, state law, or any other law of the forum court--applies. Unlike in this case, the Convention articles at issue in both *Zicherman* and *Brink's* suggested that the critical questions in those cases were to be decided according to the law of other fora. In determining whether loss of society damages, resulting from the death of a relative in a plane crash on the high seas, were recoverable, *Zicherman* looked to Article 24(2), which states that Article 24 applies "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Zicherman*, 516 U.S. at 224-25, 116 S.Ct. 629. *Zicherman* therefore concluded that "the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for," and looked to United States law to determine the result. *Id.; see also Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 8 (2d Cir.1996). Similarly, in determining whether theft by an employee acting within the scope of employment constitutes "wilful misconduct," *Brink's* looked to the law of the forum jurisdiction, as contemplated by the specific language of Article 25(1), which applies to "wilful misconduct or [ ] such default ... as, in accordance with the law of the court to which

the case is submitted, is considered to be equivalent to wilful misconduct." *See Brink's*, 93 F.3d at 1028-29.

The Convention "was intended to serve as a uniform, international law" and one of its central purposes was "to establish uniformity in the aviation industry with regard to . . . the substantive law applicable" to claims "arising out of international transportation." *Rein v. Pan American World Airways Inc. (In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*), 928 F.2d 1267, 1270, 1280 (2d Cir.1991) ("*Lockerbie I* ") (quotation marks omitted). Unless otherwise indicated by the Convention, application of various rules of substantive law on the same question, depending on the state in which an action was brought and that state's choice of law rules, tends to undermine the Convention's uniformity principle. Because no provision of the Convention suggests that the issue of causation should be decided according to the law of another jurisdiction, we look to "the conditions and limits set out in this convention." Convention, art. 24(1).

The issue of the standard of causation applicable in fraud-based "wilful misconduct" cases under the Convention is apparently one of first impression in the United States. In interpreting the Convention, we therefore "begin with the text of the treaty and the context in which the written words are used," and if necessary to "ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-

35, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991) (quotation marks omitted).

Article 25 of the Convention, as translated, applies where the plaintiffs' "damage is caused by [the carrier's] wilful misconduct. " Where fraudulent misrepresentation constitutes the "wilful misconduct," the causation language of Article 25 is susceptible to three interpretations. First, to the extent a plaintiff reasonably relies on a misrepresentation and is thereby induced to board an airplane that is hijacked--leading plaintiff to suffer injury--the misrepresentation could be said to have "caused" plaintiff's injury, or "damage." We believe that this "but for" or "factual" causation is insufficient to establish the causation required by Article 25. It cannot credibly be maintained, for example, that where a plaintiff reasonably relies upon an airline's fraudulent misrepresentations of good meals, padded seats, and ample leg room and the plaintiffs plane is then hijacked and the plaintiff injured, that the misrepresentation--by causing the plaintiff to board the plane--in any way "caused" plaintiff's injuries as defined by Article 25. At oral argument, the Singh plaintiffs conceded the untenability of such a factual causation theory.

A second interpretation--the one urged by the Singh plaintiffs on appeal--would define causation as both reasonable reliance on the misrepresentation inducing passengers to use a carrier and a reasonable relationship between the injuries and the representations relied upon.

Because the Singh plaintiffs were allegedly induced by Pan Am's misrepresentations of improved security to fly Pan Am and because one of the purposes of such security was to prevent hijackings such as the one that caused plaintiffs' injuries, the Singh plaintiffs contend that Pan Am's misrepresentations "caused" their damage. If, however, Pan Am's institution of the Alert program as promised would not have prevented the hijacking of Pan Am Flight 73, then the representation cannot have "caused" plaintiffs' injuries any more than the failure to serve a promised meal under the first interpretation, and any "reasonable relationship" between the representations and the injuries would be purely coincidental. The Convention's "clearly [ ] overriding purpose--to limit air carriers' potential liability in the event of accidents," *see Lockerbie I*, 928 F.2d at 1270, would be undermined if air carriers were held liable for damages that would have occurred regardless of whether or not the carrier's representations of improved security were ultimately performed as promised. We therefore reject this second, "reasonable relationship" formulation of causation as well. Rather, we believe that to establish Article 25(1), causation for fraud-based wilful misconduct claims, the Convention requires plaintiffs to prove by a preponderance of the evidence first, that their reasonable reliance on the fraudulent misrepresentations induced them to use the carrier and second, that the damages would not have occurred if the carrier had performed as promised. In the instant case,

therefore, defendants would not be liable under Article 25(1) if, assuming they had instituted the Alert security program as represented to the Singh plaintiffs, the hijacking would still have occurred.

(2) The Jury's Special Verdict.

Our next inquiry is whether the special verdict form and jury charge properly applied the test elucidated above, in which case the jury's special verdict would dispose of the causation issue and require dismissal of the Singh plaintiffs' Warsaw Convention claims. "The formulation of special verdict questions rests in the sound discretion of the trial judge, and should be reviewed by an appellate court only for an abuse of that discretion." *Vichare v. AMBAC Inc.*, 106 F.3d 457, 465 (2d Cir. 1996). "Reversal is warranted if the questions mislead or confuse the jury, or if they inaccurately frame the issues to be resolved by the jury." *Id.* However, the court's special verdict questions "must be read in conjunction with the judge's charge to the jury." *Id.* at 466.

The special verdict form in the instant case asked the question: "[D]o you find by a fair preponderance of the evidence that the wilful misconduct of Pan American World Airways, Inc., in connection with the Alert Security Program, was a proximate cause of the hijacking?" to which the jury answered "no." This somewhat ambiguous special verdict form--asking whether the wilful misconduct in connection with the Alert program proximately caused the hijacking-could have left some room for misinterpretation by the jury.

An advertising program plainly cannot "cause" a hijacking and it is not inconceivable that the jury could have rejected a finding of causation on this basis. The special verdict form should have asked: "Had Pan Am instituted the security as promised in its Alert Security Program, would the hijacking--and therefore plaintiffs' injuries--have occurred?"

However, the district court's jury charge as to causation stated:

> Proximate cause means that the willful misconduct of Pan Am was a substantial contributing factor in bringing about the hijacking. . . . Obviously we know that the conduct of the hijackers caused the hijacking to a large extent. So the plaintiffs do not have the burden of proving that the willful misconduct of Pan Am was the sole cause of the accident. . . . [I]f this hijacking would have occurred in any event regardless of whether Pan Am was guilty of willful misconduct or not, then proximate cause would not be shown. . . . If it was not a contributing factor in the sense that even if the willful conduct had not taken place, the hijacking would have happened anyway, . . . that even if all the security arrangements had been put in place as represented by Pan Am, even if they had done everything they said they were supposed to

> do, the hijacking would have occurred anyway, then plaintiffs would not have carried the burden of showing that it is a proximate cause.

Trial Tr. at 2763-64 (emphasis added). This jury charge did clarify the special verdict form by stating that the jury could not find causation if "the hijacking would have occurred" "even if all the security arrangements had been put in place as represented by Pan Am, even if they had done everything they said they were supposed to do." In light of plaintiffs' failure to request a more precise charge consistent with our earlier discussion of the law, their failure to object to the district court's proposed special verdict form, *see* Trial Tr. at 2543-44, and their concession before the district court that in fact the jury was "asked whether or not [the hijacking] would have happened if [defendants] did everything that was promised," Tr., March 10, 1995, at 11, we find that the jury instructions, taken as a whole, were not sufficiently misleading or ambiguous as to constitute plain error. *See United States v. Ciak*, 102 F.3d 38, 45 (2d Cir.1996) (applying plain error review where party failed to object to jury charge). In the context of the jury instructions that were given, the jury's special verdict precludes any finding of causation as to the Singh plaintiffs' fraudulent misrepresentation claim under the Warsaw Convention.

C. "Causes" v. "Arises From"

The Singh plaintiffs also challenge the district court's special verdict form and jury charge on the theory that the Article 25(1) causation test in the official American and British translations of the Warsaw Convention is mistranslated and improperly requires a stronger nexus between wilful misconduct and damage than does the test as set out in the original French text. The Singh plaintiffs note, correctly, that "[b]ecause the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis." *Eastern Airlines*, 499 U.S. at 535, 111 S.Ct. 1489. The official French text of Article 25(1) reads: "si le dommage provient de son," which the Singh plaintiffs claim to mean "if the damage arises out of " and not "if the damage is caused by" the wilful misconduct. They note further that Article 17, which in the American translation establishes carrier liability where an "accident ... caused the damage," reads "cause le dommage " in the official French text. After the jury returned its special verdict, the Singh plaintiffs presented to the district court the uncontroverted declaration of their French legal expert, Professor Alain Levasseur, that "provient de son" means "arises from" in the context of Article 25(1). The Singh plaintiffs maintain that because, under the proper translation of Article 25(1), their damages would only have to "arise from" Pan Am's fraudulent misrepresentation, the jury's special verdict as to causation does not now preclude their fraudulent misrepresentation claim.

Defendants respond that, because Article 17--creating the carrier's liability--requires proximate cause, plaintiffs' reading of Article 25 is illogical because it would "allow recovery of unlimited damages for an act of wilful misconduct that could not, in the first instance, have supported a finding of liability under Article 17." This argument misses the fact that Article 17 requires proximate causation as between the "accident " and plaintiffs' "damage," while Article 25, under plaintiffs' reading, would require the looser "arising from" causation only as between defendants' "wilful misconduct and plaintiffs' "damage." (Emphasis added). This interpretation appears to reconcile the inconsistent standards of causation by attributing them to differing levels of culpability.

Defendants next observe that no United States court has ever questioned the American/British translation of Article 25(1) as it relates to causation. "Age [, however,] is no antidote to clear inconsistency with a statute," or a treaty. Lexecon, --- U.S. at ---, 118 S.Ct. at 962 (quoting *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 300, 115 S.Ct. 2144, 132 L.Ed.2d 226 (1995)). Defendants note, finally, that Article 25(2), which as translated states that a carrier may not avail itself of liability limitations "if the damage is caused [by the wilful misconduct of] any agent of the carrier acting within the scope of his employment," reads "a ete cause" in the original French text. (Emphasis added). Defendants reason that the Convention did not contemplate

"different standards of causation ... depending on whether the party engaging in wilful misconduct [was] the air carrier itself or its agent."

We note that the Singh plaintiffs' translation error argument logically applies not just to fraudulent misrepresentation but to all wilful misconduct claims. Because plaintiffs did not object to the jury charge or special verdict form on this ground until after the jury's special verdict, however, we do not resolve this translation error issue except to hold-upon the limited record before us--that the district court's instructions were not plain error. Plaintiffs' argument based on the French text, while not without substance, is one that the district court could not have anticipated given the state of the law. *See Ciak,* 102 F.3d at 45 (applying plain error review where party failed to object to jury charge). Plaintiffs' own requested jury charge asked "whether the wilful misconduct was a proximate cause of the hijacking and the injuries and deaths of the passengers," and their requested special verdict form asked whether Pan Am's wilful misconduct was "a cause" of plaintiffs' damages. We therefore leave to another day whether "provient de son" in Article 25(1) is properly translated as "is caused by" or "arises from," (and, if the latter, its significance), an issue of apparent first impression in this country.

III. State Law Claims

The Singh plaintiffs' common law claims for

rescission, negligence, wrongful death, conspiracy to defraud, breach of contract, and fraud are all preempted by the Warsaw Convention. It is now well-established that "[a]ll state law claims that fall within the scope of the Convention are preempted." *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141 (2d Cir. 1998) (citing *Lockerbie I*, 928 F.2d at 1273); *see Coker v. Pan American World Airways, Inc. (In re Pan American Corp.)*, 950 F.2d 839, 847 (2d Cir, 1991) (transferee court in Second Circuit must apply preemption law as construed by the Second Circuit). This is because the Convention

> had two primary goals: first, to establish uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims . . . [and] second-clearly the overriding purpose--to limit air carriers' potential liability in the event of accidents.

Lockerbie I, 928 F.2d at 1270 (quotation marks omitted). Moreover, "[t]he existence of the state causes of action would not only result in the inconsistent application of law to the same accident, but also would cause enormous confusion for airlines in predicting the law upon which they would be called to respond." *Id.* at 1276. All of the Singh plaintiffs' common law claims are "within the scope" of Article 17 of the Convention, in that they all seek damages for "the death or

wounding of a passenger or any other bodily injury suffered by a passenger" caused by an "accident . . . on board [an] aircraft" in international transportation. Convention, arts. 1, 17; *see Fishman*, 132 F.3d at 141.

Because all of the Singh plaintiffs' common law claims are preempted by the Warsaw Convention, we have no need to address the second arrow in defendants' preemption quiver: the questionable contention that somehow all of plaintiffs' state claims implicate state laws or regulations "having the force and effect of law relating to rates, routes, or services of any air carrier," and are therefore preempted by the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1) (1993), reconstituted in 49 U.S.C. § 41713(b)(1). *See generally American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

IV. Challenge to the Trial Judge's Conduct

All of the plaintiffs argue that the trial judge committed reversible error by improperly questioning witnesses before the jury. In reviewing a challenge to a trial judge's conduct, we determine not "whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid[, but] . . . whether the judge's behavior was so prejudicial that it denied [a party] a fair, as opposed to a perfect, trial." *United States v.*

Rosa, 11 F.3d 315, 343 (2d Cir.1993) (quotation marks omitted). Our statement of this legal standard in no sense should be taken to detract from our counsel that, of course, "a court must strive for 'that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding,'" *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir.1996) (quoting *Glasser v. United States*, 315 U.S. 60, 82, 62 S.Ct. 457, 86 L.Ed. 680 (1942)), and "must be especially cautious and circumspect in language and conduct during a jury trial. " *Id.* (quotation marks omitted). Although "asking numerous and probing questions of witnesses" is "unquestionably proper," a "trial judge should limit questioning to inquiries necessary to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings," *United States v. Manko*, 979 F.2d 900, 905 (2d Cir.1992), and "[w]e will reverse on the basis of a judge's improper remarks if the judge expresses [his] opinion on an ultimate issue of fact in front of the jury or [argues] for one of the parties." *Causey v. Zinke* (*In re Aircrash in Bali, Indonesia*), 871 F.2d 812, 815 (9th Cir.1989) (alteration in original) (quotation marks omitted). "[I]t is only after an examination of the entire record," however, "that we can come to a conclusion about the conduct of the district court." *Manko*, 979 F.2d at 905-06 (quotation marks omitted).

Of the many examples cited by plaintiffs, the trial judge's conduct in the jury's presence was troublesome only in the judge's questioning of plaintiffs' principal airport

security expert, Isaac Yeffet, a former head of El Al security, as follows:

THE COURT: Do you have an opinion as to what the state of security was at Karachi Airport on September 5, 1986?
THE WITNESS: Yes, sir.
THE COURT: What is that opinion? THE WITNESS: That if terrorists--
THE COURT: No, no, what is that opinion -- not if, not hypothetically what could happen -- as to the state of security at that airport?
THE WITNESS: That they cannot near the aircraft stop terrorists who is [sic] coming to attack or to hijack the aircraft.
THE COURT: That is not an opinion. That is just your statement that they couldn't prevent what happened.
THE WITNESS: That's right.
THE COURT: I take it you have very good security on the West Bank, isn't that correct, in Israel?
THE WITNESS: Yes, your Honor.
THE COURT: Troops all over the place?
THE WITNESS: Yes.
THE COURT: Somebody went into a mosque and shot 60 people. So what I am saying to you is, I ask you for your opinion of the nature of security. Was it good, bad, or indifferent? That is what I want to know. That is what they need to know.

THE WITNESS: Your Honor, very bad.

Trial Tr. at 1057-58. The trial judge's reference to the Hebron massacre,[4] while arguably a legitimate effort to draw a proper expert opinion from Yeffet, could also have improperly suggested to the jury that, if "very good security on the West Bank" could not prevent the Hebron massacre, then the Pan Am hijacking would have occurred even had Pan Am fulfilled its promises of improved security. The trial judge compounded this error when, in response to Yeffet's contention that Pan Am should have had more armed guards surrounding the plane on the tarmac, the district court stated:

THE COURT: [Y]ou are an expert in this field, but I have flown and I am sure other people have flown. I don't have any recollection of having seen armed guards in most of the airplanes I have flown in that are flown by airlines. What I am asking you is this: As of September 5, 1986, was it common practice for airlines at that time to have armed guards, their own paid armed guards in the terminal, in the airport?
THE WITNESS: They had armed guards -
THE COURT: But were they employed by the airlines or were they soldiers?
THE WITNESS: No, they were from the local authorities, and some of them that had air marshals, they were on the spot

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[4]On February 24, 1994, an armed gunman killed a number of people in a mosque in Hebron on the West Bank.

until their aircraft took off.

THE COURT: But would it be fair to say that most airlines at September 5, 1986, did not employ armed guards to patrol the airline terminals? Is that true?

THE WITNESS: I cannot say most of them employed. But I can say that the local authorities, with the cooperation with the head of security of those airlines, they provide them armed guards to secure their flight.

THE COURT: But normally the armed guards, the people who patrol the terminals, are supplied by the local military authorities or local civilian authorities?

THE WITNESS: Correct.

THE COURT: At least that is what I have seen, and tell me if I am right.

THE WITNESS: You are correct.

Id. at 1062-63. Apparently disbelieving Yeffet's expert opinion that Pan Am should have employed armed guards and that such armed guards may have prevented the hijacking, the trial judge continued to question Yeffet during plaintiffs' direct examination:

THE COURT: What I am saying to you is-and I have asked you the question five times and I have gotten the same answer all five times--the one thing you say Pan Am should have had was more armed guards--at least five, as I heard your testimony.

THE WITNESS: Yes, your Honor, upwards of six.
THE COURT: How long would it take a hijacker with a machine gun to dispatch five armed guards?
THE WITNESS: What do you mean to dispatch?
THE COURT: Shoot them.
THE WITNESS: All this action is a question of seconds.
THE COURT: I know.
THE WITNESS: Now, if I have armed guard professionals, some of them with uniforms, some of them without uniforms, and they are aware why they are in the position, once the terrorists are coming with their car, they might kill one or two, but we still have professional armed guards to give the answer to kill the four terrorists.
THE COURT: It depends how good they are. If they are as good as these highly trained, specialized commando types that El Al employs, I guess you have one scenario. But if they are ordinary soldiers, you have another?
THE WITNESS: They [the security persons at Karachi] are not even soldiers, your Honor.
THE COURT: But these people testified that they are highly trained commando types, are they not?
THE WITNESS: When any other airlines decides [sic] already to have armed guards-
THE COURT: I think I have your opinion.

Id. at 1069-70. The trial judge's own experiences with airlines and his opinion as to whether El Al commandos or

ordinary soldiers would have prevented the Pan Am hijacking are plainly of no relevance to the jury. We cannot say that the above colloquies reflected "questioning [limited] to inquiries necessary to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings," *Manko*, 979 F.2d at 905, and indeed they approach the tone a cross-examination on behalf of defendants. Moreover, the trial judge's questioning went to the issue of causation, upon which the jury ultimately found in favor of defendants. During the six week trial and many thousands of pages of testimony, however, the district court did not otherwise engage in improper questioning in front of the jury. Although a very close issue, upon "examination of the entire record" in this particular case, *see Manko*, 979 F.2d at 905-906, and given the trial judge's otherwise proper conduct in front of the jury throughout the entire six-week trial, we decline to vacate the judgment of the district court based upon the trial judge's questioning of Yeffet.

Plaintiffs also point to a number of remarks made by the trial judge to counsel out of the jury's presence as evidence of the district court's bias against plaintiffs. For example, after the trial judge forbade one of the plaintiff's lawyers from speaking and suggested that he go to "a trial practice school," the judge stated to another plaintiff's lawyer:

THE COURT: If you want to improve his career, tell the firm to send him to a trial practice seminar so he learns something

about the rudiments of asking a question, the rudiments of what arguments to make to a judge, what arguments not to make to a judge. . . .

[COUNSEL]: I don't want to focus on a narrow issue. I understand what you are saying. I understand. I have heard it.

THE COURT: He doesn't know how to try a case, in my view.

[COUNSEL]: I want you to know that, with my experience and my confidence in [plaintiffs' counsel], nothing has been done to undermine that confidence in him.

THE COURT: That may be. That may only prove that you are more obdurate than you should be. Frankly, when I was a partner at a law firm, I took criticisms of federal judges more seriously than that and I paid more attention to it, which is probably why I learned more than you did. The fact of the matter is that if a federal judge with my trial experience and my judicial experience and my record as a practicing lawyer before I came here, if that opinion is so unimportant to you, maybe that explains why he is as bad as he is.

Trial Tr. at 2780-82. Other similar comments, also outside the jury's presence, are cited by the plaintiffs.

To be sure, the foregoing remarks are tough medicine, not of the sort an attorney likes to hear, and perhaps their message--that the trial attorney's performance was below par and in serious need of improvement--could have been conveyed in a less acerbic manner. If the remarks had been

made in the jury's presence, we would be concerned that they might have been taken by the jury as reflecting an opinion by the judge on the merits of plaintiffs' case. But the jury did not hear them and we will not second-guess the trial judge's belief that the attorney's performance warranted the rebuke. In our view, the remarks are indicative not of judicial bias, but rather of the judge's legitimate concern over the attorney's performance at trial. Because the remarks were made outside of the jury's presence and did not otherwise impede the fairness of the proceedings, they did not influence or prejudice the trial in any way, and we therefore decline to vacate the district court's judgment on that basis. *Cf. Santa Maria*, 81 F.3d at 275 (ordering new trial because of trial judge's prejudicial comments in jury's presence).

V. Expert Witness

Finally, all of the plaintiffs claim that the district court's refusal to qualify plaintiffs' proffered perimeter security expert--Gary Stubblefield--was an abuse of that court's discretion. "The admission or exclusion of expert testimony rests soundly in the broad discretion of the trial court." *Lockerbie II*, 37 F.3d at 824; *see General Elec. Co. v. Joiner*, --- US ---, ---, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997) (same). Stubblefield had never been a security officer with an American commercial airport or American airline, had never performed a threat assessment of an airport, had performed no recent consulting work., and had received no

training with respect to airport or airline security. In these circumstances, we cannot say that the district court abused its discretion in refusing to qualify Stubblefield as an expert.

Conclusion

We affirm the judgment of the district court for the reasons set forth above. Each party shall pay its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE HIJACKING OF PAN
AMERICAN WORLD
AIRWAYS, INC. AIRCRAFT
AT KARACHI INTERNATIONAL
AIRPORT, PAKISTAN
ON SEPTEMBER 5, 1986.

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SADANAND SINGH,
INDIVIDUALLY AND &
AS EXECUTOR OF THE
ESTATE OF KALA SINGH;
SAMIR SINGH, BY AND
THROUGH SADANAND
SINGH, GUARDIAN AD LITEM;
KALPANA SINGH, BY AND
THROUGH SADANAND SINGH,
GUARDIAN AD LITEM,

Plaintiffs,

MDL 724 (JES)
M 21-44
MEMORANDUM
OPINION AND ORDER

-against-

PAN AMERICAN WORLD

AIRWAYS, INC., A NEW
YORK CORPORATION;
PAN AM WORLD SERVICES,
INC., A FLORIDA
CORPORATION; ALERT
MANAGEMENT SYSTEMS,
INC., A FLORIDA
CORPORATION, ALERT
MANAGEMENT SYSTEMS,
INC., A FLORIDA CORPORATION,

Defendants.

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Sprizzo, D.J.:

Plaintiffs Sadanand Singh, individually and as executor of the Estate of Kala Singh, and Samir and Kalpana Singh, through a Guardian Ad Litem, (collectively, the "Singh plaintiffs") and other plaintiffs bring the instant actions against defendants Pan American World Airways, Inc. ("Pan Am"), Pan Am World Services, Inc. ("PAWS") , and Alert Management Systems, Inc. ("AMS") for damages arising out of the hijacking of a Pan Am airplane in Karachi, Pakistan in 1986. Pursuant to 28 U.S.C. § 1404(a), the Singh plaintiffs move to transfer venue to the Southern District of California for trial on the remaining non-common claims. Pursuant to Federal Rules of Civil Procedure 50, 54(b) and 58, Pan Am cross-moves for entry of judgment limiting the amount of damages to $75,000 under the Warsaw Convention and

dismissing the remaining non-common claims.[5]

BACKGROUND

In 1986, in response to increasing public concern over threats against United States air carriers operating international flights, Pan Am contracted with AMS to provide a security system for its international flights. See Declaration of Bruce H. Fagan Sworn to November 12, 1993 ("Fagan Decl.") ¶¶ 2-9, Exhs. 1-8. Pan Am thereafter implemented and advertised its "Alert Security Program" as one which provided enhanced security measures. See id.

On September 5, 1986, Pan Am flight number 73 departed Bombay, India en route to New York, New York with a scheduled intermediary stop at Karachi International Airport in Karachi, Pakistan. Joint Pre-Trial Order ("PTO"), Undisputed Facts ¶ 1. Plaintiff Sadanand Singh, his wife Kala, and their two minor children Samir and Kalpana were passengers on board flight 73. Declaration of Sadanand Singh Sworn to November 12, 1993 ("Singh Decl.") ¶ 2.

While flight 73 was on the ground at Karachi International Airport, terrorists boarded and assumed control of the aircraft. PTO, Plaintiffs' Contentions of Fact ¶¶ 86-87,

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[5]Pan Am consents to entry of judgment in the amount of $75,000 per passenger seat in cases governed by the Warsaw Convention and $ 20,000 in cases governed by the Hague Protocol. See Memorandum in Support of Pan Am's Motion for Judgment as a Matter of Law Dismissing All of Plaintiffs (sic] Claims in Excess of $75.000 at 1.

Defendant's Contentions of Fact ¶¶ 245-48. While in control of the aircraft, the terrorists opened gunfire on the passengers, killing about twenty passengers and injuring numerous others. See PTO, Plaintiffs' Contentions of Facts ¶¶ 95-97, Defendants' Contentions of Facts ¶ 283. During the hijacking, Kala Singh was killed, and Mr. Singh and his two children were injured. See Singh Decl. ¶ 3.

On February 23, 1987, Mr. Singh filed an action, against Pan Am on behalf of himself and his two minor children in the United States District Court for the Southern District of California, claiming damages for wrongful death, personal injury and false advertising. See Singh, et al. v. Pan American World Airways, Inc., et al., 87 Civ. 3108 (JES) . Numerous other wrongful death and personal injury lawsuits relating to the hijacking of Pan Am flight 73 were filed against Pan Am in various courts across the United States. See Declaration of Randolph S. Hicks, Esq. Sworn to October 15, 1993 ("Hicks Decl.") ¶ 3.

By Order filed April 7, 1987, the Judicial Panel on Multidistrict Litigation selected venue in the Southern District of New York for consolidated pre-trial proceedings pursuant to 28 U.S.C. § 1407.[6] See PTO, Jurisdiction ¶ 2. At the time

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[6]On January 8, 1991, Pan Am voluntarily initiated Chapter 11 reorganization bankruptcy proceedings pursuant to 11 U.S.C. 362(a), thereby causing an automatic stay of the actions. The United States Bankruptcy Court of the Southern District of New York subsequently granted conditional relief from the automatic stay for the instant trial on liability and damages. See Hicks Decl. 1 6; see

of consolidation, eighteen actions, including the Singh action, had been filed. See Pan Am's Notice of Motion dated October 15, 1993, Ex. C. As of October 15, 1993, thirty-five actions arising out of the hijacking of Pan Am flight 73 had been consolidated before this Court.

On October 15, 1993, Pan Am moved pursuant to 28 U.S.C. § 157 (b)(5), or in the alternative pursuant to 28 U.S.C. § 1404 (a), to transfer eighteen cases filed in the Central District of California, including the Singh action, to the Southern District of New York for a consolidated liability trial. See PTO, Jurisdiction ¶ 1. By Order dated December 13, 1993, this Court granted Pan Am's motion and, pursuant to Federal Rule of Civil Procedure 42(a), consolidated those cases for trial of all common liability issues. Id.

On April 14, 1994, after a six week jury trial, the jury found that Pan Am's conduct in connection with the Alert Security Program constituted willful misconduct. However, the jury also found that the willful misconduct was not a proximate cause of the damages claimed.[7]

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also Stipulation and Order Modifying Lifting of Automatic Stay, filed January 5, 1995.

[7]Four special interrogatories were put to the jury as follows:

1) Do you find by a fair preponderance of the evidence that Pan American World Airways, Inc. engaged in willful misconduct, as defined by the Court, in connection with the Alert Security Program?

Thereafter, pursuant to 28 U.S.C. 1404(a), the Singh plaintiffs moved for transfer of the remaining claims to the

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The jury answered "yes."

2) Do you find by a fair preponderance of the evidence that Pan American World Airways, Inc. engaged in willful misconduct, as defined by the Court, by flying into Karachi International Airport on September 5, 1986?

The jury answered "no."

3) If the answer to Question #1 is Yes, do you find by a fair preponderance of the evidence that the willful misconduct of Pan American World Airways, Inc., in connection with the Alert Security Program, was a proximate cause of the hijacking?

The jury answered "no."

4) If the answer to Question #2 is Yes, do you find by a fair preponderance of the evidence that the willful misconduct of Pan American Airways, Inc. in flying into Karachi International Airport on September 5, 1986 was a proximate cause of the hijacking?

The jury left the fourth interrogatory unanswered, because the jury's answer to the second interrogatory made it inapplicable.

Trial Transcript at 2734-35, 2804-05.

Southern District of California[8] for trial on the ground that since the Singh plaintiffs actually relied upon the misrepresentations made by the defendants in connection with the Alert Security Program, their claims were not common to those already tried. Pan Am opposed that motion on the grounds that (1) it is entitled to judgment notwithstanding the verdict on the issue of willful misconduct; (2) that any remaining claims are, in any event, preempted both by the Warsaw Convention and by the Airline Deregulation Act.[9] Pan Am also sought entry of judgment under the Warsaw Convention in the amount of $75,000 per passenger seat and dismissal of all remaining claims.[10]

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[8]The Singh plaintiffs assert that their remaining noncommon claims include a "damages claim based on common law," set forth in their Eleventh Claim for Relief of the Second Amended Complaint, and a "fraud-based Warsaw claim" in which the fraud constitutes the willful misconduct, set forth in the Third Claim for Relief of the Second Amended Complaint. See Memorandum of Points and Authorities in Support of the Singh Family's Motion to change Venue, n.3.

[9]AMS and PAWS join Pan Am's motion as it applies to the Singh action, 87 Civ. 3108 (JES), which is the only action in which they remain parties. AMS and PAWS are also subject to the protections and limitations of the Warsaw Convention, see In re Air Disaster at Lockerbie, 776 F. Supp. 710 (E.D.N.Y. 1991)(holding Lockerbie plaintiffs' claims against AMS and PAWS are likewise subject to conditions and limitations of Warsaw Convention).

[10]Pan Am seeks entry of judgment in the amount of $20,000 per passenger seat on the claims governed by the Hague Protocol rather than the Montreal Agreement. The parties have indicated to

DISCUSSION

The Warsaw Convention[11] limits liability of international air carriers for damages resulting from an "accident," which has been construed to include hijacking or terrorist activity. See Pflug v. Egyptair Corp., 961 F.2d 26, 29 (2d Cir. 1992) ; Day v. Trans World Airlines, Inc. , 528 F.2d 31, 33 (2d Cir. 1975) (en banc) , cert. denied, 429 U.S. 890 (1976). Article 17 of the Warsaw Convention states that:

> The Carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or

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the Court that they agree that the Hague Protocol and its $20,000 limitation of liability may apply to the actions brought by plaintiffs Dilip Parekh, Parag Sheth, Father Anthony Theodore and Kodiyttu Kurian. See Defendants' Opposition to Singh Family's Motion to Change Venue at 1-2; Transcript of Oral Argument dated September 30, 1994 at 2-3. In any event, the applicability of the Hague Protocol limitations is not currently before the Court. However, if the parties cannot reach a final agreement on the applicability of the Hague Protocol limitations in each of these cases, the Court will resolve that issue at a later time.

[11]Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, Oct. 12, 1929, 49 Stat. 3000, reprinted in 49 U.S.C. § 1502 Note, T.S. No. 876, 137 L.N.T.S. 11.

disembarking.

Article 22 of the Warsaw Convention limits the liability created by Article 17.[12] The Montreal Agreement,[13] which subsequently modified the Warsaw Convention, subjects the airlines to absolute liability when the flight itinerary includes a stop in the United States. The Montreal Agreement states that:

> [The] limit of liability for each passenger for death, wounding, or other bodily injury [shall be the sum of US] $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit [shall be the sum of US] $58,000

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[12]Article 22 provides:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [about $8,300 in 1934]. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

[13]Agreement Relating to Liability Limitations of the Warsaw convention and the Hague Protocol Agreement CAB 18990. Pan AM is a signatory to the Montreal Agreement, a private agreement that has been approved by the United States government by order E23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966).

exclusive of legal fees and costs.

Article 25 of the Convention lifts the liability limitation set forth in Article 22 where the damage is "caused by" the carrier's willful misconduct. Article 25 provides:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as . . . equivalent to willful misconduct.

Pan Am's threshold contention is that the Court need not even address the issues of whether, and to what extent, the jury's finding of willful misconduct in the conduct of its "Alert Security Program" can or should bar any remaining claims on behalf of passengers who actually relied upon those representations, because that finding should be set aside as unsupported by the trial proof. The Court rejects that contention.

Ample evidence was elicited at trial which rationally supports the jury's conclusion that Pan Am made representations of enhanced security measures in connection with its "Alert" program, which Pan Am either 1) knew could not or would not be implemented; or 2) had no basis to believe that they could or would be implemented. Without reciting in detail all of the trial proof regarding this issue, suffice it to say that the evidence established, inter alia, (1) that Pan Am made the alleged misrepresentations in an effort to encourage increased travel at a time when concerns about

security had led to declining revenues, Trial Transcript ("Tr.") at 80, 204, 356; (2) that Pan Am was aware that terrorist activity, especially at European and other middle eastern high risk airports, including Karachi, was a major factor in passengers' security fears, id. 81, 82; (3) that very little was actually done to provide enhanced security at any foreign airports, notwithstanding Pan Am's well publicized campaign, id. at 209-219, 444-447, 480, 828-29, 898; see also Plaintiffs' Exhs. 2, 6, 9, 119, 33A; and (4) that virtually nothing was done at Karachi Airport, where Pan Am clearly knew that it had very little, if any, control over airport security, Tr. at 93, 116, 248-49, 323, 415, 417, 630, 635-636, 692, 747, 810, 1045, 1983. In the face of this evidence and other proof which is set forth in greater detail in Plaintiffs' Memorandum of Law in Opposition To Defendant Pan-Am's Post-Trial Motion at 4-13, defendants' argument that the jury verdict was either rationally unsupported or against the weight of the evidence, lacks merit.[14]

However, the Court must also reject plaintiffs' contention that since they allege actual reliance on, defendants' misrepresentations, they need not prove that those misrepresentations were the proximate cause of plaintiffs' injuries. This argument is based upon the literal language of Article 25, where the French verb "provenir" is used, which

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[14]Because the Court has rejected defendants' claim of evidentiary insufficiency, there is no need for the Court to pass upon the issue of whether Pan Am waived this claim by failing to make a timely motion under Federal Rule of Civil Procedure 50.

plaintiffs contend is properly translated as "arising out" of and not as "caused by," as would be the case if the drafters of the Convention had employed the verb "causer," set forth in the French version of Article 17.[15]

Plaintiffs conclude from this difference in language that plaintiffs' injuries need only bear a reasonable relationship to the representations relied upon, see Eastern Airlines v. Floyd, 499 U.S. 530, 535 (1991)(looking to, inter alia, French legal meaning of Convention terms for guidance in interpretation) ; Air Saks v. France, 470 U.S. 392, 399-400 (same) , which relationship is established by the fact that protection against terrorist activity was a major reason for the representations made in the "Alert Security Program." The Court cannot accept that argument for the following reasons.

Article 25 does not in itself create any liability on the part of international air carriers; it merely removes a limitation on the liability already imposed by Article 17 where the airline is guilty of willful misconduct. Thus, where, as here there is no liability under Article 17 because the defendants' conduct was not the proximate cause of the hijacking, there is no liability that can be increased as a

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[15]Article 25 of the Warsaw convention, in its original French version, states, in pertinent part, "[s]i le dommage provient de son dol ou d'une faute qui . . . ." Declaration of Professor Alain Levasseur Sworn to December 6, 1994, at 2.

Article 17 provides in its original French version, in pertinent part, "le transporteur est responsable du dommage survenu en cas de mort . . ." and "lorsque l'accident qui a cause le dommage s'est produit A bord . . . ." Id.

consequence of defendants' willful misconduct. In sum, Article 25 serves only to remove a limitation of a liability that already exists under Article 17. See In re Lockerbie, 928 F.2d 1267, 1285-86 (2d Cir. 1991) ; In re Korean Air Line Disaster, 932 F.2d 1475, 1489 (D.C. Cir. 1991) ; Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1484 (11th Cir. 1989), rev'd on other grounds, 499 U.S. 1991. It does not create an additional and independent predicate for liability, and no court has ever so held.

This is especially true since to accept plaintiffs' argument would seriously undermine the Warsaw Convention's primary goal of providing uniformity with respect to the liability of international air carriers, see O'Rourke v. Eastern Air Lines, Inc., 730 F.2d 842, 852 (2d Cir. 1984) ; Reed v. Wiser, 555 F.2d 1079, 1089-90 (2d Cir.), cert. denied, 434 U.S. 922 (1977) , a goal which the drafters of the convention did not intend to be impacted by local laws. See Reed, 555 F.2d at 1090. Indeed, it is for that reason that the convention preempts all claims arising out of airline operations regardless of the theory upon which they are grounded or where the injury occurs.[16] See In re Lockerbie,

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[16]Article 24 of the Warsaw Convention provides that, "any action for damages however found can only be brought subject to the Warsaw Convention limitations." See, e.g., Pflug v. Egyptair Corp). , 961 F.2d 26, 28-30 (2d Cir. 1992) (Convention preempt state law claims); Chendrimada v. Air-India, 802 F.Supp. 1089, 1091 (S.D.N.Y. 1992) (Convention preempts breach of contract and negligence claims for personal injury); Adler v. Maley Hungarian Airlines, 23 Avi. Cas. (CCH) 18, 157 (S.D.N.Y. 1992) (Convention

928 F.2d 1267, 1273 (2d Cir. 1991) (state law claims falling within scope of Warsaw convention are preempted); see also In re Pan American Corp., 950 F.2d 839, 847 (2d Cir. 1991) (transferee court in Second Circuit must apply preemption law as construed by the Second Circuit). It would hardly be consistent with these objectives to apply different standards of causation depending upon whether or not the willful conduct giving rise to plaintiffs' injuries consists of fraudulent misrepresentations. It follows that if plaintiffs' claims cannot be predicated upon the Convention, they cannot be based upon federal or state common law because it is clear and indeed undisputed that plaintiffs' claims arise out of international travel.

Plaintiffs' reliance on The Normannia, 62 F. 469 (S.D.N.Y. 1894) is misplaced. Not only does that case have no bearing upon the issue of preemption, but even assuming, arguendo, that plaintiffs' remaining claims were not preempted by the Convention, The Normannia would still not support plaintiffs' argument that the jury's verdict does not bar these claims. In that case, although the court did suggest that there need only be a relationship between the subject matter of the defendants' representation, i.e., that no steerage passengers would sail on the vessel on which plaintiffs booked passage, and plaintiffs' alleged damage, i.e., detention in quarantine as a result of a cholera epidemic among steerage passengers, id. at 481, it was nonetheless true that the

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preempts claims for emotional distress resulting from hijacking).

existence of a cholera epidemic among those passengers was in fact a proximate cause of plaintiff's detention. Id. Although defendants' misrepresentations did not cause the epidemic, had the defendants' misrepresentations been true, the plaintiffs might not have been detained since those steerage passengers would not have been aboard the vessel.[17] Id.

In the instant case, defendants' misrepresentation played no part whatsoever in causing plaintiffs' injury, except in the sense that but for defendants' misrepresentations, plaintiffs might not have been on board the aircraft. Plaintiffs concede that is not legally sufficient. See Memorandum in Support of Singh Family's Motion to Change Venue at 10-11. Thus, unlike The Normannia, supra, where, had the defendants' misrepresentations been true, there may well have been no cholera epidemic, or at least a minimized risk of cholera, aboard the vessel, in the instant action, the jury found that, even if all the representations made were true and fully implemented, the hijacking still would have occurred. That

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[17]For the same reason, plaintiffs' reliance on two other cases cited is similarly misplaced. In O'Hara v. Western Seven Trees Corp. Intercoast Management, 75 Cal. App. 3d 798, 803 (1977), plaintiff's complaint, alleging proximate causation between defendant's failure to fulfill its representations regarding 24 hour security patrol at its apartment complex and plaintiff Is rape, was held sufficient to state a claim. See also Collins v. American Optometric Ass'n., 693 F.2d 636 (7th Cir. 1982) (defendant misrepresented the ability of his optometrists to diagnose glaucoma). In both cases, had the representations made been true, plaintiffs, injuries would not have occurred.

verdict forecloses any claims for injuries suffered as a consequence of the hijacking.

Furthermore, even assuming, arguendo, that plaintiffs have state and/or federal common law claims which are not preempted by the Convention and are not barred by the jury's verdict, those claims would nonetheless be preempted by the Airline Deregulation Act. See American Airlines v. Wolens, 115 S.Ct. 817 (1995) ; Morales v. Trans World Airlines, Inc., 112 S.Ct. 2031 (1992). The Airline Deregulation Act of 1987 ("ADA"), 49 U.S.C.App. § 1301 et seq., contains an express preemption clause providing:

> No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . ."

Title 49 U.S.C.App. § 1305(a) (1).[18]

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[18]Congress recodified this provision to provide:

> [A] State, political subdivision of a State, or political authority of at least two States may not enact or enforce a law, regulation, or other provision having the force and effect of law relating to a price, route or service of an air carrier that may provide transportation under this subpart."

Title 49 U.S.C. § 41713(b)(1). The change in wording was not

While the parameters of preemption under the ADA are not yet clearly defined, where, as here, the essence of the willful conduct alleged is a false advertising claim, the Court concludes that the survival of that claim would be incompatible with Congress' manifest intent to preempt all state law claims pertaining to airline fares and services.[19]

In Morales v. Trans World Airlines Inc. , 112 S. Ct. 2031 (1992), the Supreme Court held that the ADA preempts state regulation of matters relating to airline fares and services. Looking to its interpretation of identical preemptive language in ERISA, 29 U.S.C. § 144 (a), the Supreme Court in Morales, mindful of the fact that the ADA has a "broad pre-emptive purpose," id. at 2037, interpreted the phrase "relating to" to mean "having a connection with or reference to airline 'rates, routes, or services.'" Id. The Court therefore concluded that the ADA preempts state regulation and prohibitions of allegedly deceptive airline advertisement through enforcement of general consumer protection statutes. Id. at 2041.

Subsequently, in American Airlines v. Wolens, 115 S.Ct. 817 (1995), the Supreme Court held that with respect to frequent flyer programs, federal law preempted all claims

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intended to be substantive. Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994).

[19]This is especially true here, since the surcharge imposed for the promised enhanced security was a part of the fare structure and was collected as such. Tr. 745, 747-48.

based upon consumer fraud or false advertising. Although the Supreme Court held that the ADA does not preempt claims against air carriers for breach of contract, see Wolens, 115 S.Ct. at 824, and did suggest that some personal injury claims may not be preempted, id. at 827, n. 9; 830 (O'Connor, J., concurring) (personal injury claim may not be preempted if particular tort claim is not "related to" airline service), those exceptions can have no relevance where, as here, the alleged personal injuries suffered allegedly resulted from plaintiffs' reliance on false representations in the promotion and advertisement of airline services.[20] In sum, because the claims here are not "tenuous, remote or peripheral to" airline services, Morales at 2040, but rather at their core, they are preempted by the ADA. See Vail v. Pan Am Corp., 616 A.2d 523, 526 (N.J. Super, A.D. 1992) (holding ADA preempts

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[20]In their Reply Memorandum of Points and Authorities in Support of the Singh Family's Motion to Change Venue at 2, the Singh plaintiffs state for the first time that they assert noncommon claims for breach of contract which they now argue are not preempted under Wolens. The Singh plaintiffs claim that Pan Am breached its contract with the Singh plaintiffs to provide special security, Second Amended Complaint ¶¶ 36-42, and that PAWS and AMS breached their contracts with Pan Am to which plaintiffs were intended third party beneficiaries, id. ¶¶ 67-71. However, plaintiffs would still, even on a contract theory, be required to establish that the defendants' breach of contract or fraud caused their injuries, an issue which the jury has already resolved against them. Thus, these claims are also precluded by the jury's finding that the hijacking would have occurred even if defendants had provided the security as advertised.

state false advertising claims relating to Alert Security Program because claims "clearly relate[] to the 'services' of an air carrier").

CONCLUSION

For the reasons set forth above, the Singh plaintiffs' motion to transfer is in all respects denied. Defendants' motion for judgment on all claims in the amount of $75,000 per passenger under the Warsaw Convention or $20,000 in the cases governed by the Hague Protocol, subject to offsets in cases where Pan Am has made advances to plaintiffs, is granted. For the reasons set forth above, defendants' motion to dismiss the Singh plaintiffs' remaining non-common claims is granted. The parties shall file a stipulation setting forth which cases are governed by the Hague Protocol and which cases are subject to advance offsets and in what amount, on or before April 22, 1996, and a pre-trial conference shall be held on May 3, 1996 at 1:00 P.M. in courtroom 705.

It is SO ORDERED.

DATED: New York, New York
February 14, 1996

/s/ John E. Sprizzo
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC. AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986	M.D.L. 724 (JES) JUDGMENT (AEH-4562)
AJAY PATEL, a minor, by and through his Guardian Ad Litem, PARVATI PATEL; and PARVATI PATEL, Plaintiffs, vs. PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and DOES 1 through 50, inclusive, Defendants.	87 Civ. 2993 (JES)
AVANI B. SHAH and RUPAL B. SHAH, minors, by their Guardian Ad Litem, BIPIN M. SHAH, BIPIN	

M. SHAH,

Plaintiffs,

vs.

PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and DOES 1 through 50, inclusive,

Defendants.

87 Civ. 2991 (JES)

AISHA BEGUM and MEHBOOB KAHN,

Plaintiffs,

vs.

PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and DOES 1 through 50, inclusive,

Defendants.

87 Civ. 3686 (JES)

GAYATRI DAVE and GARGI DAVE, minors, by their guardian Ad Litem, VINOD DAVE; VINOD DAVE,

Plaintiffs,

vs.

87 Civ. 3975 (JES)

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation; :
and DOES 1 through 50, inclusive, :
Defendants. :
---x
:
SANJAY PATEL, a minor, by and :
through his Guardian Ad Litem, :
C.N. PATEL; C.N. PATEL, :
Plaintiffs, : 87 Civ. 3687 (JES)
vs. :
:
PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation; :
and DOES 1 through 50, inclusive, :
Defendants. :
---x
:
RANJANBEN PATEL and :
JAYSHREEBEN PATEL, minors, :
by and through their Guardian :
Ad Litem, PRAVIN PATEL; :
PRAVIN PATEL, :
Plaintiffs, : 87 Civ. 7488 (JES)

vs. :

:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :

---x

:

KHANJAN DALAL; KALPESH :
DALAH; KALPANA SHAH; :
DEEPALI DESAI; MEHUL SHAH; :
UTPALA M. DESAI; MILIND :
SHARAD DESAI; NARENDRA R. :
DESAI; SWATI N. DESAI, :
Plaintiffs, : 87 Civ. 7490 (JES)

vs. :

:

PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :

---x

:

GANGA BAHN; FATHER :
ANTHONY THEODORE; REKHA :
ADVANI; POONAM ADVANI; :

DINESH ADVANI; KISHIN AD ANI; TARA PATEL, as personal representative of the estate of KUVAR PATEL, deceased; MRUGESH PATEL, SANJAY PATEL, a minor, by his father and natural guardian C.N. PATEL; C.N. PATEL, individually; DAHIBEN PATEL and DILIP PAREKH,	:	
Plaintiffs,	:	87 Civ. 0547 (JES)
vs.	:	
PAN AMERICAN WORLD AIRWAYS,	:	
Defendants.	:	
	x	
NAGIN PATEL, TERA PATEL, SATISH PATEL, NATHUBAI PATEL, GOVIND PATEL, CHOTUBHAI PATEL, JAMNA PATEL, GANGA PATEL,	:	
Plaintiffs	:	87 Civ. 9108 (JES)
vs.	:	
PAN AMERICAN WORLD AIRWAYS, INC., a corporations;	:	

PAN AMERICAN WORLD SERVICES, INC., a corporation,
Defendants.

FARAIDOON OSHTORY,
Plaintiffs,
vs.

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN WORLD SERVICES, INC.,
Defendants.

87 Civ. 2990 (JES)

MANJULA S. PATEL, Individually and as Guardian Ad Litem for MEHUL PATEL, a minor, and as Heir at Law to SURENDRA PATEL, deceased, SANGITA PATEL, NIKITA PATEL, Individually and as Heirs at Law to SURENDRA PATEL, Deceased and MANJULA S. PATEL, as Administrator of the Estate of SURENDRA PATEL, Deceased,
Plaintiffs,

87 Civ. 2996 (JES)

vs. :
:
PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :
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:
BAKUL and VASANTI SHAH, :
Plaintiffs, : 87 Civ. 3690 (JES)
vs. :
:
PAN AMERICAN WORLD :
AIRWAYS, INC., a corporations; :
PAN AMERICAN WORLD :
SERVICES, INC., a corporation, :
Defendants. :
---x
:
HARA GOPAL; HADI ALI RIZVI; :
MRS. HADI ALI RIZVI; NIGAR :
ZEHRA RIZVI; FARHANA :
RIZVI; PUSHPAVATHI :
MURAKONDA; HANSA :
MERCHANT; KANKUBEN :
GALA; JASWANTIBEN SHAH :
and JIGHISHA H. SHAH, Minors :

by and through HARSHAD SHAH, their Father; MRS. FARHAT HUSSAIN, MABIHAH Y. HUSSAIN and HAMEED HUSSAIN, Minors by and through MRS. FARHAT HUSSAIN, their Mother; ARMISH BHAETT; JAYABEN R. SANGHANI; MRS. JAYABEN SANGHANI; JAY GRANTIER; SAID FAIZ KIDWAI; DR. SUHAIL; SUHAIL HAMED; HASSAN SYED; M. JAYED; R.A. AHMED; AMTELIVA IBRAHIM; MALIK NETRAKANTI; IMRAN ALI; KHADIYA ALI;	:	
Plaintiffs,	:	87 Civ. 3692 (JES)
vs.	:	
	:	
PAM AMERICAN WORLD AIRWAYS, INC.; THE BOEING COMPANY; THE BOEING COMMERCIAL AIRPLANE COMPANY; B.F. GOODRICH CORPORATION; and PAN AMERICAN WORLD SERVICES, INC.,	:	
Defendants.	:	

MAZHERULLAH BAIG;	:	
KHALIDIA BAIG; SHRIKANT	:	
PATEL; SHATEL PATEL; HARA	:	
GOPAL; KUSUM NAIK;	:	
HARSHAD SHAH; MOHAMMED	:	
HUSSAIN; MADHAVDAS	:	
MERCHANT; ROBERTO MUNOZ	:	
FLORES; DELFINA ROQUE DE	:	
MUNOZ; FRANCISCO JAVIER	:	
DE MUNOZ; MICHAELA DE	:	
MUNOZ; RICARDO DE MUNOZ		
MARIANA DE MUNOZ;		
individually and as survivors of		
RICARDO MUNOZ ROSALES,		
deceased; ORALIAGARICA DE		
ALVAREZ; AMICUTA DE		
ALVAREZ; AMELIA DE		
ALVAREZ; ELISA DE		
ALVAREZ; JOSE ANTONIO DE		
ALVAREZ; ORALIA DE		
ALVAREZ; NORMA DE		
ALVAREZ; JONATHAN DE		
ALVAREZ; JULIO CAESAR DE	:	
ALVAREZ; individually and as	:	
survivors of JOSE ALVAREZ	:	
LAMAR NUNEZ, deceased;	:	
Plaintiffs,	:	88 Civ. 0299 (JES)

vs. :

:

PAM AMERICAN WORLD :
AIRWAYS, INC.; THE BOEING :
COMPANY; THE BOEING :
COMMERCIAL AIRPLANE :
COMPANY; B.F. GOODRICH :
CORPORATION; and PAN :
AMERICAN WORLD :
SERVICES, INC., :
Defendants. :

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:

SURINDER SINGH AHLUWALIA, :
Individually and Guardian Ad Litem :
for JEET INDER SINGH; a minor; :
NEELAM AHLUWALIA; :
HERMINDER SINGH; CYNTHIA :
BUTHELLO; PARAG SHETH; :
FATHER ANTHONY THEODORE;:
SAID FAIZ KIDWAI; SUHAIL :
QAMAR; HARISH CHANDRA :
PATEL and MADHUKANTA :
PATEL, :
Plaintiffs, : 87 Civ. 6570 (JES)

vs. :

PAN AMERICAN WORLD :
AIRWAYS, INC. and PAN :

AMERICAN WORLD SERVICES, INC.,
Defendants.

SADANAND SINGH, Individually and as Executor of the Estate of Kala Singh, Deceased; SAMIR SINGH, by and through SADANAND SINGH, Guardian Ad litem; KALPANA SINGH, by and through SADANAND SINGH, Guardian Ad Litem,
Plaintiffs,
vs.

87 Civ. 3108 (JES)

PAN AMERICAN WORLD AIRWAYS, INC., a New York corporation, PAN AM WORLD SERVICES, INC., a Florida corporation; ALERT MANAGEMENT SYSTEMS, INC., a Florida corporation,

---

REKHA P. KUMAR, as Sole Heir of RAJESH KUMAR, deceased, and MAHENDRA R. PATEL,

Administrator of the Estate of RAJESH KUMAR, Plaintiffs, vs. PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN WORLD SERVICES, INC., Defendants.	:	87 Civ. 2999 (JES)
VINOD DAVE and NIRANJANA DAVE, Plaintiffs, vs. PAN AMERICAN WORLD AIRWAYS, INC., a corporation, and PAN AMERICAN WORLD SERVICES, INC., a corporation, and DOES 1 through 50, inclusive, Defendants.	:	88 Civ. 0929 (JES)

This multi-district litigation, comprised of a number of individual constituent actions, came on for trial before this

Court and a jury, Honorable John E. Sprizzo, United States District Judge, presiding; and the issues of liability having been duly tried commencing on March 8, 1994; the jury having rendered a special verdict on April 14, 1994, and this Court having determined as a result of that verdict that Defendant, Pan American World Airways, Inc., is not liable for damages in excess of the applicable limitation on liability imposed by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, October 12, 1929 (the "Warsaw Convention"); and Defendant; Pan American World Airways, Inc., having represented that it will not contest judgments entered in the amount of the applicable limitation on liability imposed by the Warsaw Convention, less any advances previously made by Defendant to Plaintiffs,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Plaintiffs identified below recover of Defendant, Pan American World Airways, Inc., the following amounts:

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Ajay Patel	$66,548.90	87 Civ. 2993
Parvati Patel	$75,000	87 Civ. 2993
Avani B. Shah and Bipin M. Shah, jointly	$75,000	87 Civ. 2991

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Rupal B. Shah and Bipin M. Shah, jointly	$75,000	87 Civ. 2991
Aisha Begum and Mehboob Khan, jointly	$75,000	87 Civ. 3686
Gayatri Dave, Vinod Dave, and Niranjana Dave, jointly	$50,000	87 Civ. 3975
Gargi Dave, Vinod Dave and Niranjana Dave, jointly	$50,000	87 Civ. 3975
Sanjay Patel and C. N. Patel, jointly	$12,936.50	87 Civ. 3687
Jayshreeben Patel and Pravin Patel, jointly	$75,000	87 Civ. 7488
Ranjanben Patel and Pravin Patel, jointly	$75,000	87 Civ. 7488
Deepali Desai	$75,000	87 Civ. 7490

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Kalpesh Dalal and Khanjan Dalal, jointly, as survivors of Trupti Dalal, deceased	$75,000	87 Civ. 7490
Dilip Parikh	$5,722.17	87 Civ. 0547
Tara Patel, Nathubai Patel, Govind Patel, Chotubhai Patel, Jamna Patel and Ganga Patel, jointly, as survivors of Kuvar Patel, deceased	$75,000	87 Civ. 9108
Nagin Patel, Tara Patel and Satish Patel, jointly, as survivors of Rajesh Kumar, deceased	$75,000	87 Civ.9108
Faraidoon Oshtory	$68,748.20	87 Civ. 2990

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Manjula S. Patel, individually, as guardian ad litem and as heir and administrator of the estate of Surendra Patel, deceased; Sangita Patel and Nikita Patel, individually and as heirs of Surendra Patel, deceased; and Mehul Patel, as heir of Surendra Patel, deceased	$225,000	87 Civ. 2996
Bakul Shah	$75,000	87 Civ. 3690
Father Anthony Theodore	$10,000	87 Civ. 6570
Sadanand Singh, individually and as executor of the estate of Kala Singh, deceased; Samir Singh and Kalpana Singh	$300,000	87 Civ. 3108

Plaintiff(s)	Amount	U.S.D.C./S.D.N.Y. Civ. No.
Nabihah Y. Hussain and Mrs. Farhat Hussain, jointly	$75,000	87 Civ. 3692
Hameed Hussain and Mrs. Farhat Hussain, jointly	$75,000	87 Civ. 3692
Mohammed Hussain and Mrs. Farhat Hussain, jointly	$75,000	87 Civ. 3692 and 88 Civ. 0299

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Complaints of the Plaintiffs identified below be dismissed on the merits:

Plaintiff(s)	U.S.D.C./S.D.N.Y. Civ. No.
Rekha P. Kumar, as heir of Rajesh Kumar, deceased, and Mahendra R. Patel, as administrator of the estate of Rajesh Kumar	87 Civ. 2999
Vinod Dave and Niranjan Dave	88 Civ. 0929

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant, Pan American World Airways, Inc., be and is allowed costs as the prevailing party.

DATED: New York, New York,
/s/ 3-24-97
/s/ John E. Sprizzo
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON /s/ 4/1/97

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IN RE HIJACKING OF PAN AMERICAN WORLD AIRWAYS, INC., AIRCRAFT AT KARACHI INTERNATIONAL AIRPORT, PAKISTAN ON SEPTEMBER 5, 1986

M.D.L. 724 (JES)
(All Cases)
Verdict Form

----------X

1) Do you find by a fair preponderance of the evidence that Pan American World Airways, Inc. Engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program?

YES X NO ___

2) Do you find by a fair preponderance of the evidence that Pan American World Airways, Inc. Engaged in wilful misconduct, as defined by the Court, by flying into Karachi International Airport on September 5, 1986?

YES ___ NO _X_

If the answer to neither Question #1 nor Question #2 is YES proceed no further.

3) If the answer to Question #1 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan American World Airways, Inc., in the connection with the Alert Security Program, was a proximate cause of the hijacking?

YES ___ NO _X_

~~4) If the answer to Question #2 is Yes, do you find by a fair preponderance of the evidence that the wilful misconduct of Pan American World Airways, Inc., by flying into Karachi International Airport on September 5, 1986, was a proximate cause of the hijacking?~~

YES ___ NO ___

/s/Susanne S. Greed /s/4-14-94
Signature (Foreman of the Jury)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

(Excerpts from Brief of Plaintiffs-Appellants filed in the U. S. Court of Appeals. In original, Pages 7-14)

V. ARGUMENT.

A. The District Court committed reversible error in granting judgment for defendants and dismissing the Singh plaintiffs' non-common, fraud-based Warsaw claim.

1. The standard of review applicable to a motion for judgment as a matter of law is de novo.

The standard of review by which an appellate court reviews a trial court's decision to grant judgment as a matter of law is de novo. Cf. Brady v. Southern Ry. Co., 320 U.S. 476, 479-80 (1943).

2. There has been an intervening change in the applicable substantive law which impacts upon the analysis, but not the conclusion that the District Court committed reversible error in dismissing the Singh plaintiffs' non-common, fraud-based Warsaw claim.

In its post-trial motion for judgment, Pan Am asserted that the jury's finding "that the advertising campaign was not

a proximate cause of the hijacking . . . resolves all causes of action arising under the Warsaw Convention." (4 J.A. A-1468.) In their opposition to that motion, the Singh plaintiffs resisted the notion that the jury's verdict had resolved their non-common claims and urged that passengers who suffer death or injury as the result of having been induced by fraudulent misrepresentations and promises to fly Pan Am must have a fraud-based wilful misconduct claim: (a) which is cognizable under the Warsaw Convention; (b) which is different than the claims of passengers oblivious to the fraud; and, (c) which has a causation test different than that addressed by the jury. (2 J.A. A-922.) The Singh plaintiffs aruged that fraud, in contrast to the more common forms of wilful misconduct, is a tort of communication which rarely, if ever, causes the occurrence -- the crash, the hijacking, the "accident." Rather, it induces a plaintiff to alter his position in reliance and may, thereby, subject him to the risk of injury. The Singh plaintiffs argued that reliance is, therefore, the basis for a finding of causation in a fraud claim. (*Id.* at A-923-4.) That proposition remains sound; however, because of an intervening change in the law controlling Warsaw claims, the supporting analysis has changed since the post-trial motions were briefed and argued.

To show that their non-common fraud claim presented a causation question different than that decided by the jury, the Singh plaintiffs relied primarily on federal common law, as embodied in Beers v. Hamburg-American Packet Co.

("The Normannia"), 62 F. 469 (S.D.N.Y. 1894), to supply the causation test in a fraud-based Warsaw claim. They did so because this Court had adopted "substantive federal common law as the law governing [a] cause of action under the Warsaw Convention." In re Air Disaster at Lockerbie, Scotland on December 21, 1988 ("Lockerbie I"), 928 F.2d 1267, 1279 (2d Cir. 1991). The two-fold causation test under federal common law asks whether the plaintiff relied on the fraudulent statement and, if so, whether the injury was related to the subject matter of the statement. The Normannia, 62 F. at 480.[6]

Since the post-trial motions were briefed and argued,

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[6]In The Normannia, the plaintiff feared contagion and quarantine that might result from the presence of steerage passengers on board the vessel, because of a cholera outbreak in the port of departure. After the plaintiff had boarded the vessel in reliance on false representations that there would be no steerage passengers, there was a cholera outbreak on board and the vessel was detained for quarantine. The District Court distinguished The Normannia, but did so by adopting Pan Am's misreading of the case. Just as Pan Am had, the District Court purported to distinguish the case, and explain away its finding of causation, by observing that "had the defendant's representations been true, the plaintiff might not have been detained since those steerage passengers would not have been aboard the vessel." (4 J.A. A-1699). In fact, The Normannia court found just the opposite: "Upon the evidence, I must find, therefore, that the detention of the Normannia's passengers would have been the same, had no steerage passengers been on board." The Normannia, 62 F. at 480. Using the two-fold test, The Normannia court found causation despite that fact.

the Supreme Court has held that, in the absence of a rule of law contained in the Warsaw Convention itself, the law that will govern a cause of action under the Convention is not federal common law but, rather, "the law that would govern in the absence of the Warsaw Convention." Zicherman v. Korean Air Lines Co., Ltd., 116 S.Ct. 629, 636 (1996)[7] Zicherman thus requires an analysis of controlling law different than that which the Singh plaintiffs submitted to the District Court. Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 5 (2d Cir. 1996) ("We agree that Zicherman embodies an intervening change in controlling law that requires us to alter the law of this case.").

3. California choice of law rules determine which substantive law supplies the elements of the Singh plaintiffs' non-common, fraud-based Warsaw claim.

Under Zicherman, the controlling law is to be determined in accordance with the choice of law rules of the forum jurisdiction. Zicherman v. Korean Airlines Co., Inc., 116 S.Ct. at 637; Brinks Limited v. South African Airways,

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[7]In Zicherman, because the downing of the KAL aircraft was over the high seas, the Death on the High Seas Act ("DOHSA") was held to control. Zicherman v. Korean Airlines Co., Inc., 116 S.Ct. at 637. In this case, the hijacking did not occur over open sea and, thus, DOHSA has no application under *Zicherman*; rather, as set forth herein (see infra Section V.A.4 at p. 11), California substantive law is "the law that would govern in the absence of the Warsaw Convention."

93 F.3d 1022, 1030 (2d Cir. 1996); Pescatore, 97 F.2d at 5. Where, as here, there has been a change of venue, the forum jurisdiction is where the action was filed -- not the transferee jurisdiction. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) ("A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms.").[8] In this case, the choice of law rules of California must determine which substantive law controls the Singh plaintiffs' fraud-based wilful misconduct claim. Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604, 607 (2d Cir. 1996) (citing Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993) "[A] transferee court applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed.").

4. Under California choice-of-law rules, California substantive law supplies the elements of the Singh plaintiffs' non-common, fraud-based Warsaw claim.

California follows the so-called "governmental interests" approach to analyzing choice of law issues, in which the interests of each potentially concerned state are compared. Reich v. Purcell, 67 Cal.2d 551, 556 (1967) ("The interest of a state in a wrongful death action insofar as

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[8]Pan Am moved to transfer venue alternatively under 28 U.S.C. 157 (b) (5) and 28 U.S.C. 1404 (a) ; however, § 157 (b) (5) had no application because the case did not involve the exercise of bankruptcy jurisdiction. The order transferring the case was silent as to the statutory basis. (3 J.A. A-1110.)

plaintiffs are concerned is in determining the distribution of proceeds to the beneficiaries and that interest extends only to local decedents and beneficiaries.")[9] In addition to its interest in the distribution of proceeds, California has a significant interest in protecting its residents from the fraudulent activities of non-resident enterprises conducting business within its borders. The Singh plaintiffs are all residents of California. (2 J.A. A-741-2.) California law must control.

Even if New York choice of law rules were instead used, the substantive law of the Singh plaintiffs' domicile would still control. See Pescatore, 97 F.3d at 13 ("Pan Am contends that we should disregard Scottish law and instead apply the law of the decedent's and the plaintiff's domicile -- Ohio. We agree.").

5. The test for causation in a fraud claim under California law is different than that which was applied by the jury on the common claims.

The causation question which the District Court submitted to the jury was whether the wilful misconduct caused **the hijacking**.[10] That is **not** the causation question to

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[9]See also Bernhard v. Harrah's Club, 16 Cal. 3d 313 (1976); Hernandez v. Burger, 102 Cal.App.3d 795 (1980).

[10]There is no requirement in Article 25, or in any other provision of the Warsaw Convention that the accident [hijacking] be proximately caused by the carrier's misconduct. (See infra Sections V.B. and C. at pp. 20-30.)

be resolved under California law.

Under California law, the causation element of the tort of fraudulent misrepresentation is established by proof that "as a result of the reliance upon the truth of the representation, the plaintiff . . . sustained damage." BAJI Cal. Jury Instructions (Civ. 8th ed.) (1994) No. 12.31. Where fraudulent misrepresentation results in personal injury, causation is established by proving that the plaintiff relied on the representations, thereby subjecting himself to harm. Garcia v. Superior Court, 50 Cal.3d 728, 737 (1990); Lacher v. Superior Court, 230 Cal.App.3d 1038, 1048-1050 (1991).

6. The jury's verdict did not resolve the causation issue as to the Singh plaintiffs' non-common, fraud-based Warsaw claim.

The causation issue framed by California law was not decided by the jury in the consolidated trial. The jury heard no evidence, received no instruction and made no finding concerning the Singh plaintiffs' reliance on the fraudulent advertising which was found to constitute wilful misconduct. The District Court specifically stated, "I am not going to take anything in this trial about reliance, etc. That is for the transferor court." (Tr 339:19-21 at 4 J.A. A-1806.) Nonetheless, the District Court later entered judgment for Pan Am, dismissing the very Warsaw claim that is based on reliance. In doing so, the District Court rejected reliance as a viable test for causation in a fraud case, based on its view that there cannot be different causation standards under the

Warsaw Convention:

> "It would hardly be consistent with [the objectives of the Warsaw Convention] to apply different standards of causation depending on whether or not the willful misconduct giving rise to plaintiffs' injuries consists of fraudulent misrepresentations."

(4 J.A. A-1698.)

The main objective alluded to by the District Court is that of "providing uniformity [so as not to be] impacted by local laws." Id. The desire for uniformity, however, is not a legitimate reason for declining to apply California's causation test in a Warsaw case. As this Court has observed, "Zicherman ruled specifically that the Warsaw Convention does not express a compelling interest in uniformity that warrants supplanting bodies of law that are otherwise applicable . . . [and the Supreme] Court determined that the law of international travel 'is not an area in which the imposition of uniformity was found feasible.'" Pescatore v. Pan American World Airways, Inc., 97 F.3d at 11. The District Court's edict that there cannot be different causation standards under Warsaw contravenes the Supreme Court's mandate in Zicherman.

Nowhere in the express terms of the Convention, or in the minutes of the Convention debates, is there any requirement that claims arising from an "accident" be common to all passengers. In a typical airplane mishap, the

facts supporting the passengers' liability claims are identical because all passengers have been subjected to the same set of circumstances and events. On the other hand, where the wilful misconduct consists of fraudulent statements made before the flight to lure passengers onto the aircraft, it is only logical that the misconduct can affect different passengers differently, and that they may have different claims based on their individual circumstances. The net effect of the District Court's ruling is that passengers lured to their death or injury by the fraudulent misrepresentations of an airline have no different or greater claim than one who simply boards the plane by chance. If affirmed, this anomalous result would effectively insulate an airline from the consequences of its own fraud.

Although not yet permitted to offer evidence of their reliance, the Singh plaintiffs are prepared to do so. Given the opportunity, the Singh plaintiffs will establish the causal nexus between their damage and Pan Am's wilful misconduct, according to the standard prescribed by California law. The judgment should be reversed and the action remanded to give the Singh plaintiffs their day in court.

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

(2) (2)

Nº. 98-905, 98-907

In The
Supreme Court of The United States
October Term 1998

SADANAND SINGH, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

AJAY PATEL, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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2788

QUESTIONS PRESENTED

1. Did the court of appeals correctly rule that *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) does not apply retroactively to require the setting aside of a verdict, on the ground of improper venue, in a consolidated liability trial held four years previously? Alternatively, can the judgment below be affirmed on the ground that: (i) the petitioners failed to preserve their objection to the district court's order transferring the cases to itself under 28 U.S.C. § 1404(a); or, (ii) the district court's transfer order was authorized by 28 U.S.C. § 157(b)?

2. Did the court of appeals correctly rule that, when plaintiffs base their claims of wilful misconduct under the Warsaw Convention upon alleged misrepresentations regarding security by the air carrier, plaintiffs must prove that the accident (a hijacking) would not have occurred if the carrier had done all that it said it would in the representations it made?

Corporate Disclosure Statement

Pursuant to Rule 29.6, respondent makes the following disclosure. At the time of the incident giving rise to this action and at the time of the district court trial, respondent Pan American World Airways, Inc. and Alert Management Systems, Inc. were a direct, wholly owned subsidiary of Pan Am Corporation. Pan American World Airways, Inc. then had the following subsidiaries and affiliates which were not wholly owned: Aeronautical Radio, Inc., Air Cargo, Inc., Airline Tariff Publishing Company, Escola Americana de Rio de Janeiro, Honolulu Fueling Facilities Corporation, International Aeradio (Caribbean) Ltd., Liberian Development Corporation, Manhattan Air Terminal, Inc., Nigerian Aviation Handling Co., Social Immobiliaria Norteamericana, S.A. and Société International de Télécommunications Aeronautiques.

Currently, Pan Am Corporation and the operating entities which were its direct, wholly owned subsidiaries, are in the final stages of liquidation following bankruptcy. The name Pan American World Airways, Inc. was sold through the bankruptcy proceedings and any entity now using that name is unrelated to the parties to this proceeding.

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In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986,
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Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26, 118 S.Ct. 956,
140 L.Ed.2d 62 (1998) ..... *passim*

Shah v. Pan American World Services, Inc.,
148 F.3d 84 (2d Cir. 1998) 6

Zicherman v. Korean Air Lines Co., Inc.,
516 U.S. 217, 116 S.Ct. 629,
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STATUTES, RULES & TREATIES:

Agreement Relating to Liability Limitation of the
Warsaw Convention and the Hague Protocol,
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Convention for the Unification of Certain
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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Pan American World Airways, Inc. and Alert Management Systems, Inc. (hereinafter collectively referred to as "Pan Am") respectfully pray that the petitions for certiorari filed in these cases on behalf of petitioners[1] be denied.[2]

I.

STATUTORY PROVISIONS

In addition to the statutory and treaty provisions set forth in the petitions, 28 U.S.C. § 157(b)(5) is applicable and provides that:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the

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[1]This brief is filed in opposition to the petitions for certiorari filed in Docket No. 98-905 (*Singh v. Pan American World Airways, Inc.*) ("Singh petitioners") and Docket No. 98-907 (*Patel v. Pan American World Airways, Inc.*) ("Patel petitioners"). Both petitions pertain to the same district court and court of appeals proceedings and raise the same issues for review by this Court.

[2]Citation to the petition for certiorari filed by the Singh petitioners will be to "Singh Pet."; citation to the petition for certiorari filed by the Patel petitioners will be to "Patel Pet."; citation to the appendices to the petitions will be to "Singh App." and "Patel App.," respectively.

bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

II.
STATEMENT OF THE CASE

A. The Hijacking

By means of a carefully planned and well-executed criminal scheme orchestrated by the Abu Nidal Organization, Pan Am flight 73 was hijacked while on the tarmac in Karachi, Pakistan. That attack occurred more than a dozen years ago. At the time of the hijacking, the jumbo jet was in an area heavily guarded and patrolled by the Pakistan government's armed Airport Security Force. (Under local law, Pan Am did not provide and could not have provided security for its passengers and aircraft.) The well-protected perimeter of security at the airport was penetrated by sophisticated terrorists who employed an unprecedented "deception and disguise" method of attack. In the course of the assault, a number of passengers aboard the plane were injured – some of them fatally.

B. The Claims Against Pan Am

Flight 73 had been destined for New York. Because the hijacking was an accident which occurred in international

air transport, the petitioners' claims were governed by the Warsaw Convention.[3] As supplemented by the Montreal Agreement[4] for flights serving the United States, the Convention limits air carrier liability for personal injury or wrongful death to $75,000 per passenger in all cases except those in which the plaintiffs can establish that the accident was caused by the wilful misconduct of the air carrier.

To free themselves from the treaty's limitations on liability, the petitioners urged that Pan Am engaged in wilful misconduct. Specifically, the claims were founded upon the contention that Pan Am's Alert Security Program, which had been announced several months before the hijacking, had not been properly implemented in Karachi. The Singh family petitioners additionally claimed that they would not have been on Flight 73 but for their reliance on a newspaper advertisement concerning the Alert Security Program.

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[3]The treaty commonly known as the "Warsaw Convention" is formally entitled the Convention for the Unification of Certain Rules Relating to International Transportation By Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted at* note following 49 U.S.C. App. § 40105.

[4]Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 18, 1966 (Docket 17325).

C. Consolidation for Trial

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") transferred the cases against Pan Am for consolidated pretrial proceedings in the Southern District of New York. (Singh. App. at B-47). Thereafter, Pan Am moved that the cases be consolidated for a trial on common liability issues in the Southern District of New York. (*Id.* at B-48). Pan Am furnished two bases for this motion: (i) 28 U.S.C. § 1404(a) and (ii) 28 U.S.C. § 157(b)(5). (*Id.*) Section 157(b)(5) was applicable because Pan Am was in a bankruptcy reorganization that was pending in the Southern District of New York. (*Id.* at B-47 n.6). The court's transfer order did not specify the statutory basis for the order, referring instead to the reasons given at a hearing that was not transcribed. (*Id.* at A-10).

D. Trial and Verdict

Following the presentation of evidence over a period of six weeks in early 1994, the jury returned its special verdict. (*Id.* at B-80-81). Asked whether it found "by a fair preponderance of the evidence that [Pan Am] engaged in wilful misconduct, as defined by the Court, in connection with the Alert Security Program," the jury answered, "Yes." (*Id.* at B-80). But questioned about whether it found, by the same quantum of proof "that the wilful misconduct of [Pan Am], in connection with the Alert Security Program, was a proximate cause of the hijacking," the jury responded, "No."

(*Id.* at B-81).[5] Petitioners did not object either to the instructions to the jury or to the special verdict form. (*Id.* at A-29).

E. Post-Trial Proceedings

Judgment was entered April 1, 1997, almost three years after trial. (*Id.* at B-80). Much of this intervening period of time was spent in the briefing of post-trial motions and, in particular, the Singh petitioners' efforts to try what they characterized as their "non-common" fraud claim against Pan Am. Ultimately, the district court rejected this effort and ruled that the Singh petitioners had no separate, viable claim for fraud. (*Id.* at B-61).[6]

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[5]The jury also rejected the petitioners' claim that Pan Am engaged in wilful misconduct by flying into Karachi International Airport on the date of the hijacking. (Singh App. at B-81).

[6]The district court's memorandum and order dated February 14, 1996 is printed at *In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986*, 920 F.Supp. 408 (S.D.N.Y. 1996).

III.

REASONS FOR DENYING THE WRIT

A. Introduction

The court should deny review for several reasons. With respect to the *Lexecon* issue, there is no conflict between the decisions of any of the courts of appeals and petitioners have not identified one.[7] The question of retroactive application of *Lexecon* is not squarely presented because there are alternative grounds for affirmance. And, in all events, the Second Circuit's decision that *Lexecon* should not be applied retroactively to upset a trial held four years earlier was correct for the reasons given by that Court.

With respect to the issue of causation in a Warsaw Convention case which is founded upon allegations of fraud, petitioners claim that theirs is an issue of "first impression." This plain fact puts to rest any notion that there is a conflict in the decisions of the courts of appeals. Apart from being an allegedly novel issue in the 70 year history of the Convention, the question raised by the petitioners is unlikely to recur in the future, particularly in view of recent intercarrier agreements by which carriers have waived the limitations on liability under the Convention. To the extent that petitioners challenge the jury instructions, their objection was waived by

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[7]The decision of the Second Circuit is published as *Shah v. Pan American World Services, Inc.*, 148 F.3d 84 (2d Cir. 1998).

their pretermission timely to complain. Moreover, the court of appeals was correct in ruling that the standard for proximate causation in a so-called fraud based wilful misconduct case is a matter of federal law. Finally, the court of appeals correctly held that under the Convention, the liability limitation will apply if the hijacking would have occurred even if the airline had fulfilled all its alleged promises of enhanced security. The argument postulated by the petitioners is contrary to the primary aim of the Convention: recognition of a uniform regime of limited liability in international air transportation.

B. The *Lexecon* Decision Was Properly Considered by the Second Circuit

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits

Petitioners have not identified a conflict in the decisions of the United States courts of appeals concerning whether *Lexecon* is to be applied retroactively – much less whether it is to be applied retroactively where the alleged conduct giving rise to the action occurred more than 12 years earlier and the trial that is sought to be undone took place more than four years earlier. There is no such conflict.

2. There Are Alternative Grounds for Affirmance of the Second Circuit's Decision

The issue regarding the retroactive application of *Lexecon* is not squarely presented because there are alternative grounds to affirm the court below.

a. Petitioners Waived Any Venue Objections

Lexecon instructs, *inter alia,* that an objection to venue may be waived under Section 1407(a). *Lexecon,* 118 S.Ct. at 963 n.1, 966 n.5. Under 28 U.S.C. § 1406(b), a party is required to "interpose timely and sufficient objections to venue."

In *Lexecon*, this Court forgave the petitioner's failure properly to move the JPML for remand because, while it had not sought remand from the Panel, the petitioner *had* "continuously objected" to the self-assignment in the district court (and even in petitions for extraordinary relief presented to the Ninth Circuit). *Lexecon,* 118 S.Ct. at 960, 966. Here, in contrast, to the extent there were any objections at all, they were neither timely nor sufficient.[8] The Second Circuit noted

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[8]In *Lexecon*, for instance, the petitioners moved to remand under Section 1407. In the instant case, none of the plaintiff-petitioners did so. In *Lexecon*, the petitioners subsequently renewed their motion to remand under Section 1407; here, having failed to move for remand in the first

this argument, but had no cause to address it having found that *Lexecon* did not apply retroactively. (Singh App. at A-17).

In the instant case, there were, in fact, *no* pre-trial motions to remand presented to the transferee court. And petitioners made no application in this regard to the JPML or to any other tribunal. On May 14, 1993, in an order affecting "ALL CASES," the district judge detailed a schedule which included both pretrial and *trial* dates *in the transferee court*. Still, no one argued that venue was improper. Beyond waiving any venue objection in the district court, petitioners also failed adequately to assert the issue in the court of appeals.[9] Such pretermission to raise the transfer/venue issue

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instance, there was no such prayer for petitioners to renew. The petitioners in *Lexecon* sought an interlocutory appeal through a Petition for Writ of Mandate from the Ninth Circuit; the petitioners here did not seek similar relief from the Second Circuit. And, in *Lexecon*, the petitioners pursued a post-judgment appeal of the transfer order. As noted above, and discussed further below, in the instant case, none of the petitioners challenged the propriety of venue in their opening or reply briefs to the Second Circuit.

[9]None of the four briefs filed by petitioners anywhere raised the issue that the district court improperly transferred the actions to itself for purposes of trial. Petitioners made neither mention of *Lexecon* nor of any arguments about the propriety of the transfers under either Sections 157(b)(5) or 1404(a), even although they filed their opening briefs

must be the result either of imprudence or an impermissible "wait and see" attitude. Of course, preventing two bites at the apple is among the primary reasons for the harmless error statute (28 U.S.C. § 2111).

b. Transfer to the Southern District of New York Was Permitted Under 28 U.S.C. § 157(b)(5)

When Pan Am moved for a consolidated liability trial in the transferee court, it did so pursuant to Section 157(b)(5)[10] or, *alternatively*, Section 1404(a). (Singh App. at

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approximately two months after certiorari was granted in *Lexecon*. (Sections 157(b)(5) and 1404(a) are nowhere mentioned in the Patel briefs; in the Singh briefs they appear only once, in a footnote.)

[10]Pan Am initiated Chapter 11 bankruptcy proceedings in the United States Bankruptcy Court of the Southern District of New York on January 8, 1991. (Singh App. at B-47 n.6).

In proceedings under Section 157(b)(5), "[t]ransfer should be the rule, abstention the exception." *In re Pan American Corp.*, 950 F.2d 839, 845 (2d Cir. 1991). In *Pan American Corp.*, the Second Circuit founded its holding on several grounds, including (1) the mandatory language of Section 157(b)(5); (2) the legislative history, including "Congress' desire to eliminate the confusion, delay and inefficiencies associated with the Bankruptcy Act's limited

B-48). The Second Circuit relied on the joint pre-trial order as the basis for concluding that the district court had based its transfer on Section 1404. (*Id.* at A-10). But that order was drafted by the lawyers, not by the court. The district court itself, however, expressly noted in its post-trial opinion that Pan Am's motion was based on both statutes and stated that it had granted the motion without distinguishing between the two grounds. (*Id.* at B-48). The implication is that the district court relied on both Section 157(b) and Section 1404 in granting Pan Am's motion.

To be sure, the Second Circuit also reasoned that even if the district court had relied upon Section 157(b)(5), that Section 1407, as construed in *Lexecon*, would nonetheless have required a remand to the original fora. (Singh App. at A-12-13). This rationale is erroneous. The Court in *Lexecon* did not deal with the interplay between Sections 1407 and 157(b)(5). The latter is a unique provision that allows a court to transfer to itself cases pending in other federal districts – and even in state courts. It would make no sense to conclude that Section 1407 mandates a superfluous remand to the original courts in cases where Section 157(b)(5) authorizes

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jurisdictional scheme"; and (3) "the manifest purpose of section 157(b)(5) . . . [which is] 'to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case."'" (950 F.2d at 845.)

the district court to transfer the cases to itself from those other courts.

c. The Second Circuit Correctly Addressed the Merits of *Lexecon*

Petitioners' urging – that *Lexecon* applies retroactively to this case – rests upon a fundamental misapprehension: that this Court was not serious when it said it was "unnecessary" to consider whether its decision "should be applied only prospectively" and when it therefore did not consider (*viz.* "reserved") the issue of retroactivity of its decision. *Lexecon*, 118 S.Ct. at 966 n.5.

Because in *Lexecon* the Court did not decide whether the decision would be retroactive, the Second Circuit was correct in recognizing that *Lexecon* was a case which, under *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), did not require retroactive application. (Singh App. at A-14). Particularly was this true given that the ruling in *Lexecon* relates to venue, not, as in *Harper*, to an issue of constitutional right.

So too was the court of appeals correct in applying the *Chevron Oil* retroactivity analysis (*Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)) and in thus reaching the conclusion that retroactive application, in the instant case, would not be appropriate. (*Id.* at A-14-17).[11]

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[11] Apart from application of the *Chevron Oil* factors which weigh decisively against retroactive application of

C. The Second Circuit Decision Applied the Correct Standard of Causation for a Wilful Misconduct Claim Based on Fraud

1. There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuits

Petitioners go to considerable lengths to characterize as an issue of "first impression" the question of what constitutes the appropriate causation standard in a fraud-based wilful misconduct claim under the Warsaw Convention. (See Singh Pet. at 10, 18; Patel Pet. at 16, 17 (calling the standard "unprecedented")). The fact that it has taken nearly 70 years for the question to arise under the Convention, belies petitioners' assertion that there is a compelling need for "this Court . . . [to] grant review to provide guidance on what the [causation] standard should be." (Singh Pet. at 18).

Lexecon in this case, retroactive application would also amount to a boon to these petitioners (who failed to preserve the point in any event, see *infra.*). This stroke of luck would result solely because of the twin, serendipitous facts that judgment and issuance of the mandate were not rendered with sufficient celerity by the district court and the court of appeals, respectively, to allow the case to become final before this Court rendered its decision in *Lexecon*. The verdict was rendered on April 14, 1994, and *Lexecon* was not decided until March 3, 1998, almost four years later.

2. There Is No Likelihood the Issue Raised by Petitioners Will Recur

Moreover, this causation issue, which has taken almost seven decades first to present itself, is vastly *less* likely to arise in the future.

a. The IATA Intercarrier Agreement Renders Petitioners' Arguments Moot

Under the IATA Intercarrier Agreement[12] which took effect in 1997, major international and United States air carriers agreed to forbear from availing themselves of the liability limitations of the Warsaw Convention. Under the IATA Intercarrier Agreement, passengers may assert claims for compensatory damages which are not subject to any ceiling without an accompanying requirement that they prove "wilful misconduct." With this change in the legal landscape, the issue presented by petitioners is irrelevant.

b. Montreal Protocol No. 4 Renders Petitioners' Argument Moot

To a substantial extent, petitioners' arguments depend upon the construction of Article 25 of the original Warsaw

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[12]See, e.g., DOT Order 97-1-2 (January 8, 1997) adopting the majority of the terms of the IATA Agreement on Measures to Implement the IATA Intercarrier Agreement opened, for signature in May 1996.

Convention, and in particular, linguistic quibbles about what was meant by particular terms used in the original French text of the treaty. In September 1998, however, the Senate ratified Montreal Protocol No. 4 to the Convention.[13] And with ratification, petitioners' pettifoggery evaporated. Because the Protocol significantly amends Article 25,[14] the various foreign language linguistic arguments advanced by petitioners have been settled prospectively.

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[13]Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Exec. Rep. No. 105-20, pp. 21-32 (1998).

[14]As amended, Article 25 states:

> In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

3. Petitioners Failed to Preserve Any Objection to the Manner in Which the Jury Was Instructed on the Standard of Causation

At its core, petitioners' complaint is with the way the jury was instructed on the issue of causation – that Pan Am's alleged wilful misconduct must have proximately caused the accident for purposes of recovering damages without limitation under the Convention. Petitioners take issue both with the jury charge and the special verdict form. As the Second Circuit correctly observed, however, the petitioners themselves (a) "fail[ed] to request a more precise charge," (b) "fail[ed] to object to the district court's proposed special verdict form," and (c) proffered their "own requested jury charge [which] asked 'whether the wilful misconduct was a proximate cause of the hijacking and deaths of the passengers.'" (Singh App. at 29, 32). In sum, petitioners waived any right to urge the objections here.[15]

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[15]The scope of the petitioners' waiver of arguments concerning the standard of causation in a fraud-based wilful misconduct case assumes still greater proportions with respect to the Patel petitioners. The Patels did not even urge a fraud or misrepresentation claim in the district court and (presumably for that reason) made no complaint to the Second Circuit about the causation standard applied by the district court.

4. The Second Circuit's Analysis of Causation Was Correct and Consonant with the Convention's Primary Purpose of Limiting Liability

Finally, the court of appeals was correct in ruling that the standard for proximate causation between the wilful misconduct and the hijacking is a matter to be resolved under the law of the Convention. (Singh App. at A-23). In urging application of California state law, the Singh petitioners rely upon an erroneous reading of this Court's decision in *Zicherman v. Korean Air Lines Co., Inc.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996). *Zicherman* required resort to local law for resolution of the damages issue – but only because Article 24(2) of the Convention expressly deferred to local law on that precise point. 516 U.S. at 224-25, 116 S.Ct. 629. *Zicherman* supports the holding of the Second Circuit; it does not bolster the sinuous causation analysis advanced by the Singh petitioners.

The Second Circuit also correctly held that under the Convention, if the hijacking would have occurred even if the airline had fulfilled all its alleged security promises, the limitations of liability would apply.[16] (Singh App. at A-26-

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[16]As the Second Circuit properly recognized, "[i]f . . . Pan Am's institution of the Alert program as promised would not have prevented the hijacking of Pan Am Flight 73, then the representation cannot have 'caused' [petitioners'] injuries any more than the failure to serve a promised meal .

27). To hold air carriers liable for damages that would have occurred regardless of whether the carrier's representations of enhanced security were ultimately performed as promised – as petitioners suggest – would be to assail the Convention's overriding purpose of limiting air carrier liability. (*Id.* at A-26). The Second Circuit's holding in the instant case is bolstered by this Court's most recent decision interpreting the treaty, *El Al Israel Airlines, Ltd., v. Tseng,* 1999 WL 7724 (1999), including the Court's reaffirmation of the conviction that "[t]he cardinal purpose of the Warsaw Convention . . . is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *Id.* at *8.

. . and any 'reasonable relationship' between the representations and the injuries would be purely coincidental." (Singh App. at A-26). The court of appeals did not hold, contrary to what the Patel petitioners claim, that plaintiffs would be required to prove the carrier's "direct participation" in the hijacking. Rather, they would need only to establish that the carrier was in a position to prevent the attack – something they failed adequately to prove.

IV.
CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Second Circuit in these cases.

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Nº. 98-905

In The
Supreme Court of The United States
October Term 1998

SADANAND SINGH, et al.
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the United States Supreme Court issues an opinion but does not address retroactivity because the parties waived any such argument, has the Court "reserved the question" of whether the decision applies to the parties before it so as to preclude retroactive application of the Court's decision?

2. What causation standard applies in fraud-based "willful misconduct" cases under the Warsaw Convention?

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12 *Temp. Int'l & Comp. L.J.* 189 (1998) 4

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

TREATIES AND SPECIAL CONTRACTS INVOLVED

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, TS No. 876 (1934), *reprinted in*, 49 U.S.C.A. § 40105 (1997) ("The Warsaw Convention")

Art. 22(1) of the Warsaw Convention states:

> In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

IATA Intercarrier Agreement on Passenger Liability ("IIA")

Paragraph 1 of the IIA states:

> [The undersigned carriers agree] [t]o take action to waive the limitation of liability of

recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

Paragraph 8 of the IIA states:

> [The undersigned carriers agree] [t]hat any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Agreement on Measures to Implement The IATA Intercarrier Agreement ("MIA")

Paragraph I(1) of the MIA states:

> {Carrier} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

Paragraph V(2) of the MIA states:

> Any carrier Party hereto may withdraw from this Agreement by giving twelve (12) months'

written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

I. THE IATA INTERCARRIER AGREEMENT IS A SPECIAL CONTRACT WHICH AFFECTS ONLY SIGNATORY AIR CARRIERS AND THEREFORE DOES NOT SUPERSEDE THE WARSAW CONVENTION'S LIABILITY LIMITATION FOR INJURY CAUSED BY NON-WILLFUL MISCONDUCT.

Article 22 of the Warsaw Convention authorizes air carriers to execute special contracts to increase their potential liability over the Warsaw Convention's original cap on monetary damages for injury or death arising from the non-willful misconduct of an air carrier. Article 22 has been the impetus for several contractual changes to the Warsaw Convention, most notably, the 1966 Montreal Agreement in which the official liability limit was raised to $75,000.

In the late 1990's, the International Air Transport Association ("IATA") drafted two special contracts, the IATA Intercarrier Agreement on Passenger Liability ("IIA") and the Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA"). Thomas Whalen, *Update on the IATA Intercarrier Agreement*, 13-Fall *Air & Space Lawyer* 1 (1998). Only air carriers which sign these contracts waive all liability limits for passenger injury and death. IIA, ¶ 1; MIA,

¶ I(1).[1]

Pan Am erroneously contends that the IIA and MIA render the Singh plaintiffs' arguments on a causation standard for "willful misconduct" irrelevant because proof of willful misconduct is no longer necessary to recover damages in excess of the $75,000 cap.[2] *See* Pan Am's Opposition Brief to Petition for Certiorari ("Opp. Brief"), p. 14. Pan Am's argument is incorrect.

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[1] The IIA opened for carrier signature in October 1995, whereas the MIA opened for signature in May 1996. Whalen, *supra*, at notes 15, 16.

[2] At one point, Pan Am contends the Singh plaintiffs' argument is moot. Opposition Brief, p. 14. Under *Murphy v. Hunt*, 455 U.S. 478, 102 S. Ct. 1181, 71 L.Ed.2d 353, "a case becomes moot when issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Id.* at 481. Here, the causation standard for fraud-based willful misconduct is "live" because the hijacking occurred in 1986, well before the IIA and MIA were introduced. Thus, the Singh plaintiffs' recovery is limited unless they can prove "willful misconduct." Accordingly, the Singh plaintiffs' arguments are neither moot nor irrelevant.

II. THE SINGH PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE CAUSATION STANDARD FOR FRAUD-BASED WILLFUL MISCONDUCT IS AN ISSUE OF IMPORTANCE DESPITE THE IATA INTERCARRIER AGREEMENT.

Pan Am's argument that the Singh plaintiffs' Petition for Certiorari should be denied because a "willful misconduct analysis" is no longer required under the IIA and MIA is based on two faulty premises: that all airline carriers have signed the IIA and MIA and that the carriers are irrevocably bound by the contracts.

In fact, not all airline carriers have signed the IIA or the MIA. Whalen, *supra*, at *19. Presumably, this is because the airlines are unwilling to expose themselves to unlimited liability for passenger injury or death. Moreover, even if a carrier signed the IIA and MIA, it may withdraw from the contracts and thus not be subject to unlimited liability:

> Any carrier Party may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

IIA, ¶ 8; MIA ¶ (V)(2).[3]

If a carrier is not a party to the IIA and the MIA (because it did not sign the contracts or it withdrew from them), the carrier's liability is governed by the Warsaw Convention. Thus, the carrier may still take advantage of the cap on damages. Because of this,

> dual liability regimes will likely exist for the United States in the foreseeable future: a regime for those carriers that implemented the 1996 IATA Intercarrier Agreement and a regime for those carriers that chose not to implement the IATA Intercarrier Agreement, in which case liability will be governed by the Warsaw Convention as supplemented by the 1966 Montreal Agreement (a limit of $75,000 unless willful misconduct is proved)."

Whalen, *supra*, at *19.

Accordingly, parties suing for an injury sustained in an international aviation accident will still be required to argue the airline carrier engaged in willful misconduct if they are to recover damages in excess of the Warsaw Convention

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[3] Even if an air carrier signed the IIA or MIA, it may still argue it is not bound by it. Rubin, *The Warsaw Convention: Capping the Value of Life?*, 12 *Temp. Int'l & Comp. L.J.* 189, 234 (1998). If the contract is void, the Warsaw Convention's cap on damages would apply thus making a willful misconduct analysis necessary.

cap. It follows that the causation standard for willful misconduct remains a relevant and important issue in the field of international aviation injury claims.

CONCLUSION

For the foregoing reasons, the Singh plaintiffs respectfully request this Court grant a Writ of Certiorari so as to correct the conflict of law between the Second Circuit and the United States Supreme Court, and to decide an important federal question, that has not been, but should be, settled by the court.

Dated: January 28, 1999

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